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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

BMW MANUFACTURING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Foreign Trade Zone Act's prohibition on the assessment of customs duties and excise taxes on foreign goods admitted to a United States foreign-trade zone extend to the Harbor Maintenance Tax?

STATEMENT PURSUANT TO RULE 29.6

BMW Manufacturing Corporation is a wholly owned subsidiary of Bayerische Motoren Werke Aktiengesellschaft in Munich, Germany. BMW Manufacturing Corporation has no publicly-traded stock.

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BMW Manufacturing Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 241 F.3d 1357 (Fed. Cir. 2001). Appendix ("Pet. App.") 1a-13a. The opinions of the United States Court of International Trade are reported at 69 F. Supp. 2d 1355 (CIT 1999) and 23 Ct. Int'l Trade __, Slip Op. 99-102 (Sept. 30, 1999). Pet. App. 14a-29a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. A petition for rehearing en banc was denied on May 9, 2001. Pet. App. 30a. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions relevant to this petition are reprinted in the Appendix at Pet. App. 31a-35a.

STATEMENT OF THE CASE

Foreign goods admitted to a foreign-trade zone ("FTZ") are shielded from the assessment of customs duties and excise taxes by the Foreign Trade Zones Act. 19 U.S.C. § 81c(a), in pertinent part, provides that foreign goods brought into a FTZ are not "subject to the customs laws of the United

States" unless and until they are "sent from a zone into customs territory of the United States." Foreign goods admitted to a FTZ "are subject to import duties only when they are withdrawn for domestic consumption." *R.J. Reynolds v. Durham County*, 479 U.S. 130, 151-52 n.22 (1986).

In accordance with Customs regulation 19 C.F.R. § 24.24(e)(2)(iii), foreign goods admitted to a FTZ are currently subject to the assessment of the Harbor Maintenance Tax ("HMT"). Petitioner has challenged the validity of this Customs regulation based upon the statutorily prescribed prohibition contained in the Foreign Trade Zones Act.

First enacted in 1934, the Foreign Trade Zones Act, 19 U.S.C. § 81a, *et seq.*, sets forth the procedures for establishing a foreign-trade zone, as well as enumerating the administrative treatment to be accorded goods admitted to a FTZ. Stated simply, a foreign-trade zone is a discrete secured area, located at or adjacent to a Customs port of entry, authorized by Congress and created by the Foreign Trade Zones Board. "[T]hough located on United States soil — [a foreign-trade zone] receives treatment under the customs laws as a territory outside the United States." *Ford Motor Co. v. United States*, 157 F.3d 849, 852 (Fed. Cir. 1998).

Today there are more than 600 foreign trade zones[1] located throughout the United States. According to the latest

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1. There are two types of foreign-trade zones — a general purpose foreign-trade zone and a foreign-trade subzone. A general purpose foreign-trade zone must be made available for use to all qualifying companies. In contrast, a foreign-trade subzone is (Cont'd)

figures published by the Foreign-Trade Zones Board, at the close of the government's 1999 fiscal year (ending September 30, 1999) there were a total of 245 general purpose foreign-trade zones and 406 foreign-trade subzones in the United States, with more than $173 billion dollars of goods passing through the zones, $58 billion of which were foreign goods.[2] The most appealing attribute of foreign-trade zones for their users is the statutory prohibition on the assessment of customs duties and excise taxes on foreign goods while in the zone.[3] "[T]he exemption from customs duties is likely

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established for the use of a single specific company. *See* 15 C.F.R. §§ 400.2(g) and (p). With respect to statutory treatment, there is no material difference between the two types of foreign-trade zone entities. *See generally*, *Conoco, Inc. v. U.S. Foreign-Trade Zones Board*, 18 F.3d 1581, 1582-83 n.3 (Fed. Cir. 1994). As used herein, the terms "foreign-trade zone," "FTZ" and "zone" refer to both general purpose foreign-trade zones and foreign-trade subzones.

2. *61st Annual Report of the Foreign-Trade Zones Board.* A listing taken from this report identifying many of the companies that used zones in 1999 is set forth in the Appendix. Pet. App. 36a-40a.

3. The FTZ customs duty/excise tax shield provides three tangible benefits to zone users: (1) For goods which never enter the customs territory of the U.S., *e.g.*, they are exported to another country from the zone, no U.S. customs duties or excise taxes need be paid; (2) For goods entering the customs territory of the U.S., the payment of customs duties and excise taxes are deferred while the goods remain in the zone; and (3) For goods processed, manufactured or otherwise manipulated in the zone, the zone user can select whether to have the foreign goods classified for Customs appraisement purposes in their condition as admitted to the zone (known as "privileged foreign status"), or in their condition when
(Cont'd)

the single most attractive feature that so encourages use of the zones . . ." *3M Health Care, Ltd. v. Grant*, 908 F.2d 918, 921 (11th Cir. 1990).

In 1986 Congress enacted the Water Resources Development Act, Pub. L. No. 99-662, 100 Stat. 4082, for purposes of improving the nation's ports and harbors. To help fund the improvement programs, Title XIV of the Act established the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-62, which imposes an *ad valorem* tax on the use of designated ports by importers, exporters,[4] domestic shippers and passenger lines. The HMT, presently fixed at .125%, is assessed on the value of the commercial cargo. 26 U.S.C. § 4461(b).

Petitioner has a facility in Spartanburg, South Carolina at which it manufactures motor vehicles using both foreign and domestic components. Petitioner also receives foreign produced motor vehicles at this facility. The Spartanburg

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entered into the customs territory of the U.S. from the zone (known as "non-privileged foreign status"). 19 C.F.R. § 146.65(a). The status selection ordinarily depends upon which classification provision is subject to a lower duty rate. *See Armco Steel Corp. v. Stans*, 431 F.2d 779, 785 (2d Cir. 1970) ("[T]he Foreign Trade Zones Act clearly contemplates that trade zone users may take advantage of differing rates in tariff schedules and thereby, depending on what form a product might take when imported from the zone into the U.S. customs territory, save on customs duties.")

4. In *United States v. United States Shoe Corporation*, 523 U.S. 360 (1998), the Court held that the imposition of the HMT on goods exported from the United States violated Article 1, § 9, clause 6 of the U.S. Constitution ("No tax or duty shall be laid on articles exported from any State").

facility is a foreign-trade subzone, having secured this status by way of a grant issued by the Foreign-Trade Zones Board on June 24, 1994, Board Order No. 697 (59 Fed. Reg. 35096). Save for the HMT, foreign goods admitted into petitioner's Spartanburg zone are not assessed with customs duties or excise taxes at the time of zone admission. Duties and taxes are imposed at the time the goods enter the customs territory of the United States. 19 U.S.C. § 81c(a) and 19 C.F.R. § 146.62. In contrast, for foreign cargo "admitted into a foreign trade zone, the applicant of admission (the person or corporation responsible for bringing merchandise into the zone)" must pay the HMT quarterly "for all shipments unloaded and admitted to the zone." 19 C.F.R. § 24.24(e)(2)(iii). Petitioner paid (and continues to pay) the HMT on the foreign goods admitted to its Spartanburg zone in accordance with Customs regulations.

Petitioner initiated this civil action in the Court of International Trade ("CIT"), which has exclusive jurisdiction to review petitioner's FTZ HMT challenge under 28 U.S.C. § 1581(i). Pet App. 15a. *See United States Shoe Corp.*, 523 U.S. at 366. On cross-motions for summary judgment, the CIT sustained Customs' FTZ HMT regulations.

Noting that the HMT statute contained no express FTZ exemption, the court stated that § 81c(a) relief would be "available only if the HMT is a customs duty." Pet. App. 19a. The court deemed it irrelevant that 26 U.S.C. § 4462(f)(1) provided that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty." The court reasoned that if the HMT was not a customs duty, it did not deserve to be treated as a customs duty for FTZ Act purposes. ". . . Congress did not designate the HMT a customs duty.

Is it enough that it is treated as a duty for administration and enforcement? The answer is 'no'!" Pet. App. 20a.

The CIT did concede that petitioner had raised a compelling point; in contrast to Congress's drafting of other excise tax provisions, FTZs were not included within the definition of "United States" for HMT assessment purposes.

> Plaintiff notes on the other hand, that for several excise tax purposes "United States" is defined to include specifically FTZs. *See* 26 U.S.C. §§ 4612(a)(4)(C) (1994) and 4682(e)(2)(1994). It also notes that there is no specific inclusion of FTZs in the more general definition of "United States" found at 26 U.S.C. § 7701(a)(9) (1994). This is a strong argument. Congress clearly knows how to include FMZs [sic] in the definition of the United States for tax purposes if it so chooses.

Pet. App. 23a-24a. The CIT, however, reasoned that the purpose for imposing the HMT conflicted with the barring of its assessment on FTZ admitted goods. "Although constructed as an *ad valorem* tax on merchandise, the purpose of the HMT is to charge for port use. . . . To have goods escape the HMT, even though the port use is the same for other goods, is not within the intent of Congress." (footnotes omitted). Pet. App. 21a.

As part of the effort to demonstrate that zone admission was the improper time to impose the HMT, petitioner pointed out that under Customs regulation § 24.24(e)(2)(iii) the party responsible for FTZ HMT payment was the applicant for FTZ admission — an entity not even identified in the statute as being liable for the HMT. The CIT, in a subsequently

issued judgment, Pet. App. 28a-29a, concluded that petitioner was liable for the HMT as either an "importer" or a "shipper", without stating which specific basis applied.

Possessing exclusive jurisdiction under 28 U.S.C. § 1295(a)(5) to review CIT decisions, the Federal Circuit affirmed the trial court's holding on appeal. The court ruled that the HMT was not embraced by the FTZ customs duty prohibition because § 81c(a) was a "substantive", rather than an "administrative" provision of the customs laws. Pet. App. 8a. The Federal Circuit rejected petitioner's argument that § 4462(f)(1) contained a provision for the treatment of the HMT like a customs duty, which, pursuant to 19 U.S.C. § 1528, would require that the HMT be construed as a customs duty. "Because Congress has not expressly stated that the preferences and exemptions available under the customs laws apply to the HMT, § 81c(a) therefore cannot enable BMW to avoid HMT liability for the importation of the merchandise at issue." Pet. App. 10a.

As to petitioner's primary alternative claim — if the HMT were not to be treated as a customs duty it had to be treated as an excise tax, and excise taxes were also embraced by § 81c(a)'s imposition prohibition — the court of appeals initially asserted that the HMT was not an excise tax, but a "generalized Federal charge for the use of certain harbors." Pet. App. 11a. The court further reasoned that even if the HMT was an excise tax, § 81c(a) could not apply because § 4461(c)(2)(B) mandated HMT imposition at unloading and "the legislative history of § 81c(a) demonstrates that the exemption therein is targeted at duties and taxes that attach upon formal entry into the United States customs territory." *Id.*

Petitioner filed a timely petition for rehearing en banc, which the Federal Circuit denied without a published vote. Pet. App. 30a.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision in this case reverses a half century old statutory prohibition on the imposition of customs duties and excise taxes on admissions of foreign goods to FTZs. The court of appeals misconstrued the plain meaning of the HMT statutory language, ignored this Court's reasoning in *United States Shoe Corp.*, and adopted respondent's construction of the applicable statutory language despite respondent having successfully argued against such statutory construction in other judicial proceedings — including before this Court — and in its own published administrative rulings.

The question as to duty and tax exposure for foreign goods admitted to foreign-trade zones goes to the very heart and reason for creation of these specialized trade enclaves. "The existence of the present trade zones has done much to stimulate American commerce both import and export. The proposed permission of manufacturing in the zone is expected further to assist American business by enabling it to manufacture certain types of products for export under minimum cost conditions." S. Rep. No. 1107, 81st Cong., 2d Sess. 2 (1949), *reprinted in* U.S.C.C.A.N. 2533, 2534. To maintain these minimum cost conditions for foreign-trade zones, the FTZ Act was amended in 1950 so that "[d]uties and taxes would be payable . . . only if and when the merchandise was sent into custom territory." *Id.* at 2535-36.

In view of the exceptional breadth of the Federal Circuit's decision — permitting on a national basis HMT

assessment upon the long favored duty and tax protected United States foreign-trade zones program[5] — the petition for a writ of certiorari should be granted.

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5. *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1981) addressed the issue of taxes imposed on goods stored in a facility possessing similar characteristics to a FTZ, a customs bonded warehouse. This Court expressly recognized the Congressional importance placed upon these unique programs in encouraging international trade, even at the expense of reducing United States revenues.

> A consequence of making the United States a center of world commerce was that
>
> > "our carrying trade would be vastly increased; that shipbuilding would be stimulated; that many foreign markets would be supplied, wholly or in part, by us with merchandise now furnished from the warehouses of Europe; that the industry of our seaports would be put in greater activity; [and] that the commercial transactions of the country would be facilitated. . . ." Cong. Globe, 29th Cong., 1st Sess., App. 792 (1846) (remarks of Sen. Dix).
>
> To these ends, Congress was willing to waive all duty on goods that were reexported from the warehouse, and to defer for a prescribed period, the duty on goods destined for American consumption. This was no small sacrifice at a time when customs duties made up the greater part of federal revenues, but its objective was to stimulate business for American industry and work for Americans. [Footnote omitted.]

Id. at 151.

Subsequently, in explaining why foreign-trade zones are accorded *more favorable treatment* than customs bonded

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I. THE DECISION BELOW WRONGLY CONCLUDED THAT THE HMT SHOULD NOT BE TREATED LIKE A CUSTOMS DUTY FOR PURPOSES OF § 81c(a)'S ASSESSMENT PROHIBITION.

Petitioner's underlying challenge is to the validity of Customs regulation § 24.24(e)(2)(iii); the quarterly collection of the HMT on foreign goods admitted to FTZs. If Customs were required to treat the HMT as if it were a customs duty[6], 19 U.S.C. § 81c(a) would operate to bar HMT imposition on goods admitted to a FTZ until such time as the goods entered

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warehouses, this Court, in *R.J. Reynolds*, 479 U.S. at 151-52 n.22, observed that "[f]oreign-trade zones are valued because they actually promote domestic industry and create jobs."

6. Petitioner is not claiming that the HMT is a customs duty *per se*, but rather that it is to be treated as if it were a customs duty for purposes of the administrative and enforcement provisions of the customs laws, which includes 19 U.S.C. § 81c(a). The separate, but parallel bases for extending customs laws to an exaction — duty designation or duty treatment — have been statutorily recognized. 19 U.S.C. § 1528 provides that a tax or charge shall not be construed to be a customs duty for revenue collection purposes "unless the law imposing such tax or charge designates it a customs duty *or* contains a provision to the effect that it shall be treated as a duty imposed under the customs laws" (emphasis added).

Amongst the considerations Congress weighted in electing to treat the HMT like a customs duty in § 4462(f)(1), was the understanding that if designated a customs duty the HMT: (1) would plainly run afoul of the Export Clause's prohibition against the imposition of a "duty" on exports and (2) could be viewed as violating GATT (now World Trade Organization) obligations of the United States. H. Rep. No. 99-251(IV), 99th Cong., 1st Sess. 23-24 (1985).

the customs territory of the U.S. Customs regulations, including 19 C.F.R. § 24.24(e)(2)(iii), are entitled to so-called "*Chevron* deference." *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999). Under the *Chevron* doctrine, administrative interpretations receive judicial "controlling weight" if they satisfy a two-step analysis. First, the court must determine whether Congress has spoken on the matter being interpreted, or if a gap in the statute has been left for the agency to fill. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted). *See also Brown v. Gardner*, 513 U.S. 115, 122 (1994) (fact that a Department of Veterans Affairs regulation "flies against the plain language of the statutory text exempts courts from any obligation to defer to it").

Should a gap or ambiguity exist in the statute, the court must then proceed to the second *Chevron* step, ascertaining whether the administrative interpretation is reasonable. *Haggar Apparel Co.*, 526 U.S. at 394-95 (remand to the lower court to determine if Customs regulation "met the preconditions for *Chevron* deference as a reasonable interpretation of the statutory phrase"); and *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 392 (1999) (failure of the FCC to interpret "the terms of the statute in a reasonable fashion" resulted in the Court's invalidating a regulation).

Customs' HMT imposition on FTZ admitted goods defies the directive of § 4462(f)(1), which plainly and unambiguously states that the HMT is to be treated like a customs duty for purposes of the administrative and enforcement provisions of the customs laws, including HMT

liability. This unencumbered reading of the HMT statute is supported by this Court's reasoning in *United States Shoe Corp.*, the Federal Circuit's decision in *IBM, Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001), as well as legal positions posited by the Customs Service in other judicial proceedings, including before this Court.

A. The Statutory Language Unambiguously Directs That The HMT Should Be Treated As If It Were A Customs Duty

The parties and the lower courts agree that 19 U.S.C. § 81c(a) bars the imposition of customs duties on the admission of foreign goods into a foreign-trade zone. Pet. App. 6a and 17a. The dispute lies with whether the HMT must be treated like a customs duty (or excise tax) for purposes of § 81c(a). The courts below have ruled that the HMT need not be treated like a customs duty. The statutory language directs otherwise.

There is no more fundamental precept of statutory construction than to effectuate the intent of Congress, and that the words used by Congress are the clearest expression of that intent. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that [Congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); *see also Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3 (1989).

Section 4462(f)(1), in pertinent part, provides that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax [HMT] imposed by this subchapter (and in respect to persons liable

therefor) as if such tax were a customs duty." In construing statutory language, one normally applies the common meaning of the terms used therein. *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import.") (citations omitted). In its decision, the Federal Circuit applied no common meaning or definition to the term "administrative" or "administers". Instead, the circuit court decreed, without citing a single authority, that "customs laws that affect HMT liability" constitute substantive, rather than administrative customs laws. Pet. App. 8a. This conclusion is in error for two reasons.

First, HMT liability has not been cleaved from the body of customs administrative and enforcement provisions that are to apply to the HMT. The parenthetical clause in § 4462(f)(1) — "and in respect to persons liable therefore" — expressly includes HMT liability as being within the embrace of the customs "administrative and enforcement" laws that are to be applied to the HMT as if it were a customs duty. Second, in *IBM*, 201 F.3d at 1372, the phrase "administration and enforcement" was found to require a broad construction, which expressly included "the assessment and collection" of the HMT.[7] *Id.*

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7. The issue in *IBM* was whether interest was owed on HMT export refunds. The government vigorously argued that the HMT should be treated *like a customs duty* because the interest provision for customs duty refunds, 19 U.S.C. § 1505(c), did not permit the payment of interest on HMT export refunds. Section 4462(f)(3), the counterpart to § 4462(f)(1), provided that the HMT shall not be treated like a tax "for purposes of subtitle F or any other provision of law relating to the *administration and enforcement* of internal

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(Cont'd)
revenue taxes." To ascertain whether the payment of interest on HMT refunds was encompassed by the phrase "administration and enforcement", the Court of Appeals plumbed the meaning of the phrase within the context of § 4462(f).

> Because the HMT statute does not define "administration and enforcement," we assume that the terms have their ordinary meaning, for which we may consult a dictionary. *See Best Power Tech, Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary.") (citations omitted). Black's Law Dictionary defines "administer" as "[t]o manage or conduct." Black's Law Dictionary 44 (6th ed. 1990). "Enforce" is defined as "[t]o put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." *Id.* at 528.
>
> Applying these definitions to the HMT statute, *we read "administration and enforcement of internal revenue taxes" broadly to encompass not only management of the tax system, including the assessment and collection of tax payments* and issuance of refunds and interest on those refunds by the agency responsible, but also enforcement of the tax laws, including the obtaining and enforcement of judgments against both taxpayers and the United States. *Nothing in the language of the statute limits "administration and enforcement" to the narrow interpretation applied by the Court of International Trade, i.e., "matters of routine administration and enforcement by an agency." U.S. Shoe*, 20 Ct. Int'l Trade at 208.

IBM, 201 F.3d at 1372 (emphasis added).

Section 4462(f)(1) states that the administrative provisions of the customs laws shall apply to the HMT as if the HMT were a customs duty. Administrative provisions of the customs laws include statutes which impact upon the "assessment and collection" of the HMT, including liability for the HMT. Section 81c(a) is such a customs administrative law and is therefore applicable to the HMT.[8]

B. In *United States Shoe Corp.* This Court Stated That The HMT Should Be Treated As If It Were A Customs Duty.

United States Shoe Corp. concerned the constitutional challenge to the imposition of the HMT on exports. Customs sought to defend its assessment on exports by asserting that the HMT was neither a duty nor a tax (both being prohibited by the Constitution), but a user fee. The Court rejected that claim because of the disparity between the services rendered and the compensation determined entirely on the *ad valorem* basis of the cargo. In addressing the nature of the HMT, this Court expressly found that despite its codification as a tax Congress had provided that the HMT be treated like a customs duty for administrative purposes.

> The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use"; 26 U.S.C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code. In like vein, Congress provided that, for administrative, enforcement, and jurisprudential

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8. Section 4462(f)(1)'s directive to treat the HMT like a customs duty, including for § 81c(a) purposes, is reinforced by 19 U.S.C. § 1528. *See discussion supra* at 10 n.6.

> purposes, the HMT should be treated "as if [it] were a customs duty." §§ 4462(f)(1), (2).

United States Shoe Corp., 523 U.S. at 367.

In the instant case, the Federal Circuit reasoned that " '[t]he HMT is a *generalized Federal charge for use of certain harbors* . . . intended to be assessed independently of whether the "port use" is for imports, exports, or other shipments. . . .' *Texport Oil Co. v. United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999) (citations omitted) (emphasis in original)." Pet. App. 9a. The circuit court's decision, for all intents and purposes, assumes that the HMT is a valid harbor user fee exaction unrelated to and distinct from the cargo (be it exports or imports) upon which it is assessed. This construction of the HMT was unanimously rejected in *United States Shoe Corp.* This Court recognized that the HMT should be treated as a duty or tax for export purposes; it must similarly be treated as a duty (or tax) for import purposes.

C. Under The Doctrine Of Judicial Estoppel, The Government Should Be Barred From Asserting That The HMT Not Be Treated Like A Customs Duty.

The doctrine of judicial estoppel equitably bars a party from asserting a position in one legal proceeding that conflicts with a position successfully asserted in another judicial proceedings. *New Hampshire v. Maine*, 121 S. Ct. 1809, 1814 (2001). Judicial estoppel is intended to protect the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). The exigencies of revenue maximization have prompted the Customs Service to affix a Janus-like

mask onto the HMT — treated like a customs duty/not treated like a customs duty — wholly dependent upon which face results in the greater accumulation of HMT monies.

To defeat the claim for interest on HMT refunds that were owed to exporters following the *United States Shoe Corp.* decision, the government successfully argued in *IBM, Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001) that the HMT must be treated like a customs duty. The Federal Circuit adopted the government's argument in ruling against the exporter's interest claim.

> It appears abundantly clear from these provisions that, even though the HMT is codified as an excise tax and is part of the Internal Revenue Code ("IRC"), Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty, and not a tax under the IRC.

Id. at 1371.

Following the adverse decision of the Federal Circuit, IBM filed a petition for writ of certiorari, which the government opposed. Before this Court the government reiterated that Congress had mandated that the HMT be treated as a customs duty. "Congress elected to treat the Harbor Maintenance Tax as a customs duty, rather than as an internal revenue tax." Government's Opposition to the Petition for Writ of Certiorari in *IBM*, Docket No. 00-482, at 5.

As in *IBM*, the instant case involves the applicability of customs provisions to HMT exactions. The government's adoption of diametrically opposed positions in *IBM* and this

case is related, not to a line of text in the HMT statute, but to the HMT "bottom line." In successfully arguing for treatment as a customs duty in *IBM*, the government was able to escape paying interest on the HMT it unconstitutionally assessed on exports. By adopting the contrary position in this case, the government hopes to continue collecting the HMT on all zone admitted foreign goods. Such shifting of positions by the government to meet the "exigencies of the moment" is precisely the type of conduct that judicial estoppel was designed to thwart.

II. CODIFIED AS AN EXCISE TAX, § 81c(a)'S ASSESSMENT PROHIBITION APPLIES TO THE HMT EVEN IF IT WERE NOT TREATED LIKE A CUSTOMS DUTY.

Even assuming that the HMT were not to be treated like a customs duty, it would still be encompassed by § 81c(a)'s imposition shield, which extends not only to the assessment of customs duties, but to taxes, including excise taxes.

Although the FTZ Act was enacted in 1934, by 1949 only five foreign-trade zones had been established in the United States.[9] To make FTZs more attractive to potential users, Congress, in 1950, amended the Act. Amongst the changes made to the FTZ Act was the prohibition on the assessment of all customs duties *and* taxes upon FTZ admission.

> The first proviso to section 3 of the act of June 18, 1934, now authorizes the appraisement and liquidation of duties on foreign merchandise

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9. S. Rep. No. 1107, 81st Cong., 2d Sess. 2 (1949), *reprinted in* U.S.C.C.A.N. 2533, 2534.

> when it is first admitted to a zone, such duties not to be paid until the merchandise is sent into customs territory. This privilege has not been used by importers, possibly because the proviso also imposes an absolute requirement that the duties be paid within a maximum of 2 years, even if the merchandise is never sent into customs territory. The proposed legislation would modify this proviso in several respects.
>
> * * *
>
> The present absolute requirement for payment of duties on merchandise obtaining a privileged status under the proviso would be eliminated. *Duties and taxes would be payable in accordance with the finding only if and when the merchandise was sent into customs territory.*

S. Rep. No. 1107, 81st Cong., 2d Sess. 3-4 (1949), *reprinted in* U.S.C.C.A.N. 2533, 2535-36 (emphasis added).

The legislative history of the FTZ Act amendment is silent as to the reason for the wedding of customs duties *and* taxes for FTZ assessment protection. It is most probable that the linkage of the two exactions was an outgrowth of the long recognized customs jurisprudential doctrine that exactions on imports are to be assessed and collected in accordance with the laws applicable to customs duties.

> Regardless of how taxes may be designated by the Congress, if they are imposed on imports while in customs custody, they are essentially customs duties and are determinable and collectible as prescribed by law. *Brown v. State*

> *of Maryland*, 12 Wheat. 419; *Almy v. California*, 24 How. 169; *Robbins v. Shelby County*, 120 U.S. 489; *May v. New Orleans*, 178 U.S. 496; *Fairbank v. United States*, 181 U.S. 283; . . .

Faber, Coe & Gregg v. United States, 19 CCPA 8, 12 (1931) (additional citations omitted).[10]

Both the Internal Revenue Service and the Customs Service have consistently maintained in published decisions that customs duties and excise taxes are not to be imposed

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10. Whatever the rationale for the FTZ assessment prohibition on duties *and* taxes, it is clear that the judicial principle recognized in *Faber, Coe* — taxes on imports are determinable and collectible in accordance with customs duty provisions — remains a part of the body of customs law. *See Bercut-Vandervoot & Co. v. United States*, 46 CCPA 28, 32, C.A.D. 691 (1958), *cert. denied*, 359 U.S. 953 (1959) (imports subject to internal revenue tax had to comply with customs duty assessment and collection provisions despite the resulting unequal treatment accorded domestic and foreign goods); *United States v. Westco Liquor Co.*, 38 CCPA 101, 107 (1951) (customs duty assessment and collection provisions applied to an internal revenue tax even though the tax had not qualified for customs duty construction under 19 U.S.C. § 1528); *United States v. Mitsui & Co. Ltd.*, 29 CCPA 154, 156, C.A.D. 185 (1941); and *Chicago Heights Distribution Co. v. United States*, 55 Cust. Ct. 254, 259 (1965).

The legislative history of the HMT makes clear that in selecting the Customs Service to administer and enforce the HMT, Congress recognized that Customs' "substantial body of law relating to the importation of merchandise and the collection of customs duties" was "to apply with regard to the port user fee charges imposed by the committee amendment as if such charges were customs duties." H. Rep. No. 99-228, 99th Cong. 2d Sess. 10 (1986), *reprinted in* U.S.C.C.A.N. 6705, 6714-15.

on foreign goods admitted to an FTZ. "[T]hese foreign trade zones are generally designed to provide for the importation and storage of foreign merchandise without subjecting that merchandise to United States customs duties or Federal excise tax until the merchandise is prepared to enter the domestic stream of commerce." IRS Revenue Ruling 76-171. "Duties and taxes become due only when foreign merchandise leaves a zone for entry into the Customs territory of the United States." Customs Service Decision 81-209.

The HMT statute is codified in Chapter 36, Subtitle D, Title 26 of the United States Code, which chapter and subtitle are respectively entitled "Miscellaneous Excise Taxes" and "Certain Other Excise Taxes." In *IBM* the Federal Circuit recognized that "even though the HMT is codified as an excise tax and is part of the Internal Revenue Code ("IRC"), Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty, not a tax under the IRC." *IBM*, 201 F.3d at 1371. Logically, if it could not be treated as a customs duty, the HMT would necessarily revert to its codified status — an excise tax.

The Federal Circuit response to the excise tax argument was to initially suggest that the HMT was not an excise tax, but a "generalized Federal charge for the use of certain harbors."[11] Pet. App. 11a. The court further reasoned that even if the HMT was an excise tax it could not be deferred until FTZ goods entered the customs territory of the

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11. The Federal Circuit's characterization of the HMT as an exaction on the use of ports need not conflict with its codification as an excise tax. An excise tax includes a "tax imposed on . . . [an] activity," e.g., use of a port. *See Black's Law Dictionary*, Seventh Edition (1999), p. 585.

U.S. because § 4461(c)(2)(B) required HMT imposition at "unloading." *Id.*

Section 4461(c)(2)(B) only *contingently* imposes HMT liability at the time of unloading; the HMT is, in fact, not imposed at unloading on *any* eligible transaction.[12] In contrast, HMT liability affixed by § 4461(c)(1)(A) on the importer "in the case of cargo entering the United States" is not subject to regulatory modification. The "entry" of cargo into the United States refers to the clearance of goods into the customs territory of the United States following the filing with Customs of appropriate documentation by the importer of record. 19 U.S.C. § 1484. *See Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1118 (Fed. Cir. 1998). Thus, § 4461(c)(1)(A)'s establishment of HMT liability for goods "entering the United States" implicitly, if not explicitly, fixes HMT liability for foreign goods to their formal entry into the customs territory of the United States.

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12. Section 4461(c)(2)(B) provides that the HMT shall be imposed at time of unloading "*[e]xcept as provided by regulations*." By Customs regulations, the HMT is not imposed at unloading on any subject transactions. Although considered an "import vessel movement" under 19 C.F.R. § 24.24(e)(2), FTZ admissions of foreign goods are subject to the same quarterly payment schedule as domestic shipments and passenger ships. 19 C.F.R. §§ 24.24(e)(1)(ii), (e)(2)(iii) and (e)(3)(ii). Foreign goods not admitted to FTZs pay the HMT "in accordance with the normal Customs collection procedures," 19 C.F.R. § 24.24(e)(2)(ii), which is not at unloading, but at time of entry into the customs territory of the United States. This is the precise treatment petitioner is seeking for its FTZ admissions.

III. AS EVIDENCED BY CONTRADICTORY ADMINISTRATIVE RULINGS, CUSTOMS' FAILURE TO TREAT THE HMT AS A DUTY OR EXCISE TAX FOR FTZ ADMISSION PURPOSES IS PLAINLY UNREASONABLE.

As earlier noted, even where regulations are not contrary to statutory language, *Chevron* deference will not be extended if the regulations are found to be unreasonable. *Haggar Apparel Co.*, 526 U.S. at 394; and *AT&T Corp.*, 525 U.S. at 392. Conflicting agency interpretations are *prima facie* evidence of an arbitrary and capricious administrative construction. "[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *City of Fort Morgan v. FERC*, 181 F.3d 1155, 1163 (10th Cir. 1999). Contravening its HMT FTZ regulatory scheme, the Customs Service has issued administrative rulings that have held that: (1) the FTZ Act is an administrative provision of the customs laws; (2) the legislative history of the HMT mandates treatment as a customs duty for FTZ purposes; and (3) the HMT is an excise tax.

In Customs Headquarters Ruling 227638, dated November 30, 1998, Pet. App. 41a-58a, Customs defined the meaning of the phrase "administrative and enforcement" provision as it appears in 19 U.S.C. § 58c(g)(2).[13] Customs,

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13. The importer in Ruling 227638 had sought an exemption from payment of the Merchandise Processing Fee (MPF) for oil admitted to a foreign-trade zone. If the MPF were treated like a customs duty, the importer would not be entitled to the exemption. The statutory language directing how Customs was to treat the MPF is in all material respects identical to the HMT statutory directive. (Cont'd)

relying upon statutory provisions, case law, as well as the legislative history of the HMT, concluded that "[t]he legislature viewed administrative and enforcement provisions of customs laws as including *the collection of duties*." Pet. App. 48a. Moreover, Customs expressly held that the provisions of the FTZ Act were administrative provisions of the customs laws.

> There is nothing in the statute, legislative history or regulations to indicate that the *duties provided for in the first proviso of 19 U.S.C. § 81c(a), meant* anything other than the duties for purposes

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(Cont'd)

19 U.S.C. § 58c(g)(2)	26 U.S.C. § 4462(f)(1)
Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations, other than those laws and regulations relating to drawback, shall apply with respect to any fee prescribed under subsection (a) of this section, and with respect to persons liable therefor, as if such fee is a customs duty.	Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty.

Customs' legal analysis of the MPF statutory language — which point for point contradicts the government's position in this case — was that the MPF had to be treated like a customs duty, thereby denying an MPF exemption to the FTZ admitted oil. To reach its conclusion, Customs relied upon the legislative history of the *HMT* to establish that the MPF should be treated like a customs duty and ruled that the FTZ Act and regulations were administrative provisions of the customs laws.

> of which the MPF and *other fees, are treated as duties. If any fee was to be exempt from the proviso, it could have been addressed.* Under 19 U.S.C. § 58c(g)(2), the only exception to the treatment of the subject fees as a duty, is for purposes of drawback. If such an exception had also been intended for administration of FTZs, it could have been easily stated . . .

Pet. App. 57a (emphasis added).

Another example of Customs employing a "bottom line" analysis to HMT statutory construction is reflected in Customs Headquarters Ruling 223430, dated April 15, 1992. Pet. App. 57a-64a. Once again contradicting its position in this case, Customs ruled that the HMT was an excise tax. By so holding Customs was able to deny an HMT exemption under 19 U.S.C. § 1309(a)[14] to otherwise qualifying jet fuel stored in a customs bonded warehouse.[15]

As repeatedly evidenced in its administrative interpretations (as well as in positions posited in judicial proceedings, *see* Point I. C, *supra* at 16-18), the Customs Service views its mandate for HMT construction to require maximum revenue enhancement without regard for reasoned and consistent statutory construction; the HMT to be treated

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14. 19 U.S.C. § 1309(a), in pertinent part, provides that supplies used in international trade which are removed from a customs bonded warehouse or a foreign-trade zone are exempt from the payment of all customs duties and internal revenue taxes.

15. Customs has held in at least five other administrative rulings that the HMT is an excise tax. Customs Headquarters Rulings 223371, 223627, 223777, 223790 and 223496.

like a customs duty or excise tax when revenue collections are increased or preserved, such treatment to be disavowed when HMT collections are threatened.[16] Customs' "heads I win, tails you lose" paradigm constitutes a wholly arbitrary and capricious statutory construction approach that is patently unreasonable and intrinsically inequitable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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16. To the extent that the HMT lends itself to numerous interpretations, the HMT, as a revenue raising statute, should be construed in favor of the party subject to the exaction. "At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional cannon that construes revenue-raising laws against the drafter." *United Dominion Industries, Inc. v. United States*, 121 S. Ct. 1934, 1944 (2001) (Thomas, J., concurring).

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED MARCH 5, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-1135

BMW MANUFACTURING CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: March 5, 2001

Before MICHEL, LOURIE, and CLEVENGER, *Circuit Judges*.

LOURIE, *Circuit Judge*.

BMW Manufacturing Corporation appeals from the decision of the United States Court of International Trade upholding the United States Customs Service's ("Customs' ") imposition of the Harbor Maintenance Tax ("the HMT") on merchandise admitted into a foreign trade zone ("FTZ") pursuant to 19 C.F.R. § 24.24(e)(2)(iii) (2000). *BMW Mfg. Corp. v. United States*, 69 F. Supp. 2d 1355 (Ct. Int'l Trade 1999) ("*BMW I*"). Because we conclude that the Court of

International Trade did not err in upholding Customs' regulation, we affirm.

BACKGROUND

BMW is a United States company incorporated in the state of Delaware, and is a wholly-owned subsidiary of Bayerische Motoren Werke Aktiengesellschaft of Munich, Germany. *Id.* at 2-3. BMW has a facility in Spartanburg, South Carolina, at which it both manufactures motor vehicles and receives motor vehicles that were manufactured overseas. *Id.* at 3. BMW utilizes both U.S. and foreign components in the vehicles it manufactures at Spartanburg. *Id.* BMW's Spartanburg facility is a foreign trade subzone.[1] *Id.* The foreign goods imported into that facility, whether complete motor vehicles or automotive components, are therefore entitled to receive beneficial FTZ treatment. *See generally* 19 U.S.C. §§ 81a-81u; 19 C.F.R. pt. 146. One such benefit afforded merchandise admitted into an FTZ is the exemption it receives from the customs laws of the United States. 19 U.S.C.A. § 81c(a) (West Supp. 2000).

The HMT, contained in title XIV of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat.

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1. An FTZ is a discrete area located at or adjacent to a port of entry that is authorized by Congress to receive preferential treatment under the customs laws of the United States. *See generally* 19 U.S.C. §§ 81a-81u (1994); 19 C.F.R. pt. 146 (2000). An FTZ may either be a general purpose foreign trade zone or a foreign trade subzone. *BMW I* at 3 n.3. The distinction between the two is meaningless for purposes of this litigation; the Spartanburg facility will therefore simply be referred to as an FTZ.

4082 (1986), is an *ad valorem* tax on commercial cargo involved in "any port use," including imports. I.R.C. § 4461. Customs regulations mandate the imposition and collection of the HMT upon the admission of foreign merchandise into an FTZ. 19 C.F.R. § 24.24(e)(2)(iii).[2] The HMT is to be paid on a quarterly basis by the applicant for admission into the FTZ with a completed Customs Form 349 ("CF 349"). *Id.* As the party admitting foreign goods into an FTZ, BMW has filed CF 349s with HMT payments in accordance with 19 C.F.R. § 24.24(e)(2)(iii). *BMW I* at 4.

BMW commenced a civil action at the United States Court of International Trade challenging the imposition and collection of the HMT on the merchandise it had imported into its Spartanburg facility, initially asserting four causes of action. *Id.* Of those four causes of action, BMW ultimately pursued only its claim that the HMT, whether treated as a customs duty or an excise tax, may not be imposed and collected upon foreign goods that are admitted into an FTZ. *Id.* Both BMW and the government moved for summary judgment. *Id.* at 1.

The Court of International Trade granted summary judgment in favor of the government and held that 19 C.F.R. § 24.24(e)(2)(iii) properly imposes HMT liability on cargo

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2. 19 C.F.R. § 24.24(e)(2)(iii) provides in relevant part that "[i]n cases where imported cargo is unloaded from a commercial vessel at a port within the definition of this section and admitted into a foreign trade zone, the applicant for admission (the person or corporation responsible for bringing [the] merchandise into the zone) . . . shall pay all fees for which he is liable on a quarterly basis in accordance with paragraph (f) of this section . . . ."

admitted into an FTZ. *Id.* at 10. The court noted that merchandise admitted into an FTZ is not included among the list of port uses specifically exempted from the HMT under I.R.C. § 4462. *Id.* at 6. The court also found that because the HMT is treated as a customs duty for administration and enforcement purposes only, neither I.R.C. § 4462(f)(1) nor 19 U.S.C. § 1528 (1994) rendered applicable the customs duty exemption in 19 U.S.C. § 81c(a) for cargo admitted into an FTZ. *Id.* at 7. Finally, after the parties informed the court that BMW paid the international shipping charges for the merchandise at issue, the Court of International Trade, in a separate opinion, concluded that the HMT was properly assessed against BMW because it qualified as either an "importer" or a "shipper" under I.R.C. § 4461(c). *BMW Mfg. Corp. v. United States*, No. 97-03-00396 (Ct. Int'l Trade Sept. 30, 1999).

BMW timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1994).

DISCUSSION

This court reviews a grant of summary judgment by the Court of International Trade "for correctness as a matter of law, deciding de novo the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1543 (Fed. Cir. 1994) (quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993)). When Congress has not directly addressed the precise question of statutory interpretation at issue, we give deference to Customs' regulations interpreting

portions of a statute that are silent or ambiguous as to that issue. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

BMW argues that the imported merchandise at issue qualifies for the customs duty exemption provided by 19 U.S.C. § 81c(a) for goods admitted into an FTZ, and that it is therefore precluded from being assessed with HMT liability. Specifically, BMW contends that this court in *IBM Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), construed the "administration and enforcement" language of I.R.C. § 4462(f)(1) to include customs laws that deal with the assessment of HMT liability, and therefore that the exemption in § 81c(a) applies. BMW further argues that 19 U.S.C. § 1528, which states that a tax shall be construed to be a customs duty if the enabling statute contains a provision to the effect that it be so treated, triggers § 81c(a) and thus precludes the application of the HMT against the merchandise at issue. Alternatively, BMW argues that even if the HMT is not treated as a customs duty, it is codified as an excise tax. Therefore, BMW asserts, it cannot be assessed with HMT liability because goods admitted into an FTZ are exempt from excise taxes under § 81c(a). Finally, BMW argues that even if the HMT may be properly imposed on merchandise admitted into an FTZ, it is neither an "importer" nor a "shipper" under Customs' own definitions of these terms and thus that it was improperly charged with HMT liability.

The government responds that Congress created express exemptions from the HMT for certain port uses under I.R.C.

§ 4462, and therefore that it would have expressly exempted goods admitted into FTZs from the HMT if it had intended to do so. The government argues that the HMT is simply a general charge for the use of certain harbors, which is imposed at the time of cargo unloading without regard to whether the goods are admitted into an FTZ or the customs territory of the United States. The government also contends that the exemption provided by § 81c(a) does not apply to the HMT because I.R.C. § 4462 directs Customs to treat the HMT as a customs duty for collection purposes only, and because § 1528 requires that a tax be expressly designated as a customs duty to be afforded the preferences of the customs laws. Finally, the government argues that Customs' determination that HMT liability should be assessed upon the applicant for admission to an FTZ should be upheld as a reasonable interpretation of the HMT statute.

We agree with the government that merchandise admitted into an FTZ is not exempt from the HMT and that Customs properly applied 19 C.F.R. § 24.24(e)(2)(iii) to the cargo at issue. We note at the outset that Congress has provided express exemptions from the HMT for certain port uses. Congress created a "[s]pecial rule for Alaska, Hawaii, and [United States] possessions" that exempts certain cargo from the HMT in I.R.C. § 4462(b). Congress also expressly exempted "bonded commercial cargo entering the United States for transportation and direct importation to a foreign country" from the HMT in I.R.C. § 4462(d)(1). It thus appears that Congress expressly provided for the exemption of certain merchandise from the HMT. Where it did not so provide, it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius.* The absence of any

provision specifically exempting goods admitted into an FTZ therefore leads to the conclusion that Congress did not intend such an exemption.

Because the HMT statute itself does not exempt goods admitted into an FTZ, we next turn to BMW's assertion that the HMT should be treated as a customs duty, thereby precluding the application of the HMT to goods admitted into an FTZ under § 81c(a). Section 81c(a) reads as follows:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into [an FTZ] and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into [the] customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from [an FTZ] into [the] customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise . . . .

19 U.S.C.A. § 81c(a). BMW's first argument, that § 81c(a) applies based on the language of I.R.C. § 4462, is without merit. Section 4462(f)(1) states that "[e]xcept to the extent otherwise provided in regulations, all *administrative and*

enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefore) as if such tax were a customs duty." I.R.C. § 4462(f)(1) (emphasis added). As aptly stated by the Court of International Trade, just because the "administrative and enforcement provisions" of the customs laws apply to the HMT does not mean that all provisions of the customs law apply. Had Congress intended to apply substantive provisions of the customs laws that affect HMT liability, such as the customs duty exemption in § 81c(a), it would not have limited the applicable provisions to those that implicate only the "administrati[on] and enforcement" of the HMT.

We agree with the government that our decision in *IBM* does not require a different result. The issue in *IBM* was whether the similar "administration and enforcement" language of I.R.C. § 4462(f)(3) encompassed judicial enforcement for purposes of awarding interest on HMT refunds. *IBM*, 201 F.3d at 1369. We held in *IBM* that such judicial enforcement was covered under the language of the statute, and thus denied the claimant interest on its HMT refund because that relief was only available under the tax laws. *Id.* at 1372. Nowhere in the opinion did we address whether the "administration and enforcement" language of § 4462(f)(3) could be construed to render substantive provisions of the customs laws applicable to the HMT. We simply held that judicial enforcement was enforcement within the language of the statute. We therefore reject BMW's inapt reliance on *IBM*.

Moreover, BMW's argument that the exemption for goods admitted into an FTZ should apply to the HMT is contradicted by the plain language of the HMT statute. The HMT statute makes clear that the tax is due immediately upon cargo unloading, without regard to the destination of the merchandise. I.R.C. § 4461(c)(2) (stating that "the [HMT] shall be imposed . . . at the time of unloading"). Under BMW's construction of the statute, the destination of the cargo would be crucial, as the HMT would not be due until the merchandise was formally admitted into the customs territory of the United States. *See* 19 U.S.C. § 81c(a) (exempting imported merchandise from the customs laws until formal entry into customs territory). Had Congress intended to impress such a condition on the imposition of the HMT, it seems illogical that it would have imposed the tax "at the time of unloading." Furthermore, we have previously stated that "[t]he HMT is a *generalized Federal charge for the use of certain harbors* . . . intended to be assessed independently of whether the 'port use' is for imports, exports, or other shipments . . . ." *Texport Oil Co. v. United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999) (citations omitted) (emphasis added). Congress therefore could not have intended that there be an HMT exemption for goods admitted into an FTZ without explicitly providing for one, as it did in the case of "bonded commercial cargo," I.R.C. § 4462(d)(1), because it is a general tax on port use that is not conditioned on formal entry into the customs territory of the United States.

BMW's second argument, that § 1528 triggers the application of § 81c(a), is equally without merit. Section 1528 states:

Appendix A

> No tax or other charge imposed by or pursuant to any law of the United States shall be construed to be a customs duty for the purposes of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty or contains a provision to the effect that it shall be treated as a duty imposed under the customs laws.

19 U.S.C. § 1528. The HMT is not a customs duty. Nowhere in the HMT statute has Congress expressly designated the HMT as a customs duty. Furthermore, the HMT is not treated as a customs duty, as only the "administrative and enforcement" provisions of the customs laws are said to apply to the tax. I.R.C. § 4462. Delegating to Customs the responsibility of collecting and enforcing the HMT is not the same as treating the HMT itself as a customs duty. Moreover, in addressing the predecessor statute to § 1528, the Court of Customs and Patent Appeals[3] in *Westco* stated that "the purpose Congress had in mind . . . was to make clear that preferences and exemptions applicable to customs duties were to have no applicability to internal revenue taxes unless Congress expressly said so." *United States v. Westco Liquor Prods. Co.*, 38 C.C.P.A. 101, 107 (1951). Because Congress has not expressly stated that the preferences and exemptions available under the customs laws apply to the HMT, § 81c(a) therefore cannot enable BMW to avoid HMT liability for the importation of the merchandise at issue.

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3. Decisions of the Court of Customs and Patent Appeals are binding precedent on this court. *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

BMW alternatively argues that if the HMT is not found to be a customs duty, it is codified as an excise tax, and therefore that BMW's imported merchandise is exempted from HMT liability because § 81c(a) encompasses excise taxes. However, as discussed above, the HMT is a "generalized Federal charge for the use of certain harbors." *Texport Oil*, 185 F.3d at 1297 (Fed. Cir. 1999). Although the HMT is organized under subtitle D of title 26, entitled "Miscellaneous Excise Taxes," it is assessed on cargo without regard to whether that cargo formally enters the customs territory of the United States. *See* I.R.C. § 4461(2)(B) (stating that "the [HMT] . . . shall be imposed . . . at the time of unloading"). Conversely, the legislative history of § 81c(a) demonstrates that the exemption therein is targeted at duties and taxes that attach upon formal entry into the United States customs territory. *See* S. Rep. No. 81-1107, at 3-4 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2533, 2535-36 ("Duties and taxes would be payable . . . only *if and when the merchandise was sent into customs territory.*") (emphasis added). Even if the HMT is properly considered an excise tax, § 81c(a) therefore does not exempt cargo admitted into an FTZ from liability under that tax provision.

Finally, BMW asserts that even if the HMT is properly assessed on goods admitted into an FTZ, it is neither an "importer" nor a "shipper" under the HMT statute and thus that it was improperly charged with HMT liability. We disagree. The HMT statute imposes liability as follows:

> (1) Liability. — The tax imposed by subsection (a) shall be paid by —

(A) in the case of cargo entering the United States, the *importer*,

. . .

(C) in any other case, the *shipper*.

I.R.C. § 4461(c)(1) (emphasis added). BMW argues that because cargo admitted into an FTZ has not officially entered the customs territory of the United States, and because FTZs are not included in the definition of "United States" under the HMT statute, it cannot be considered an "importer." BMW further argues that although Customs defined a "shipper" to be "the person or corporation who pays the freight" for domestic shipment purposes, 19 C.F.R. § 24.24(e)(1)(i), it defined "shipper" in the context of foreign merchandise transactions as "[o]ne who transports goods for a charge; a common carrier," Customs Headquarter Ruling #226514 (March 6, 1996) (citing Black's Law Dictionary 1235 (5th ed. 1979)). BMW therefore argues that it cannot be considered a "shipper" because it neither transports its goods for a charge nor acts as a common carrier.

Although BMW points to alternative definitions of "importer" and "shipper" under which it might avoid liability for the HMT, it has not demonstrated any reason why placing liability on the applicant for admission into an FTZ is an unreasonable interpretation of § 4461(c)(1). Neither "importer" nor "shipper" is expressly defined in the HMT statute. Furthermore, the legislative history of that statute does not help us to decipher the meaning of "importer" or "shipper." When Congress has not "directly spoken to the

precise question [of statutory construction] at issue," *Chevron*, 467 U.S. at 842, we defer to an agency regulation interpreting that statute, *Haggar*, 526 U.S. at 392. Because Customs has reasonably determined that the applicant for admission into an FTZ is the "importer" or "shipper" under § 4461(c), we conclude that BMW was properly charged with HMT liability for the importation of the merchandise at issue.

We have considered BMW's remaining arguments and have determined that they are without merit.

CONCLUSION

Because the Court of International Trade did not err in upholding Customs' regulation, we

AFFIRM.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DATED SEPTEMBER 14, 1999

Slip Op. 99-95

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 97-03-00396

BMW MANUFACTURING CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

[Partial summary judgment for defendant.]

Dated: September 14, 1999

* * *

OPINION

RESTANI, Judge: This matter is before the court on cross-motions for summary judgment. Plaintiff seeks recovery of Harbor Maintenance Tax ("HMT")[1] payments

1. The HMT is established by 26 U.S.C. §§ 4461, 4462 (1994).

collected by the United States Customs Service on merchandise admitted into a foreign trade zone ("FTZ") within the geographical territory of the United States.

I. Jurisdiction

In *United States v. U.S. Shoe Corp.*, 118 S.Ct. 1290 (1998), the Supreme Court held that imposition of the HMT on exports violated the Export Clause of the Constitution. It also upheld jurisdiction over such challenges in this court, pursuant to 28 U.S.C. § 1581(i). *Id.* at 1293-94. The HMT on admissions into foreign trade zones is paid on a quarterly basis, as was the HMT on exports. Again, Customs' role as HMT collector is passive; it merely receives payments. There is no decision-making by Customs under 19 U.S.C. § 1514 which would give rise to protest-denial jurisdiction under 28 U.S.C. § 1581(a). As no other subsection of § 1581 specifically covers these claims, the court's residual jurisdiction, 28 U.S.C. § 1581(i), applies. *See Miller v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (§ 1581(i) jurisdiction proper only when jurisdiction not otherwise available under another subsection of § 1581).

II. Background[2]

Plaintiff, BMW Manufacturing Corporation ("BMW"), is a United States company incorporated in the State of Delaware. BMW is a wholly-owned subsidiary of Bayerische Motoren Werke Aktiengesellschaft of Munich, Germany. BMW has a facility in Spartanburg, South Carolina, at which

2. The statement of facts is derived from plaintiff's opening brief. Defendant does not dispute the material facts contained therein.

it both manufactures motor vehicles and receives foreign manufactured motor vehicles. BMW utilizes U.S. components and foreign components in the vehicles it manufactures at Spartanburg. The Spartanburg-manufactured motor vehicles are sold in the United States, as well as shipped abroad for sale in other countries. The foreign-produced motor vehicles received at the Spartanburg facility are intended for sale in the U.S. BMW's Spartanburg facility is a foreign trade subzone.[3] Foreign goods admitted to the Spartanburg FTZ, including complete motor vehicles and automotive components, are entitled to receive beneficial FTZ treatment. *See generally* 19 U.S.C. Chapter 1 and 19 C.F.R. Part 146 (1999).

Customs regulations mandate the imposition and collection of the Harbor Maintenance Tax upon the admission of foreign merchandise into a FTZ. *See* 19 C.F.R. § 24.24(e)(2)(iii) (1999). The HMT is to be paid on a quarterly basis by the party responsible for admitting the foreign goods into the FTZ by way of a completed Customs Form 349 ("CF 349"). *See id.*

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3. The difference between a general purpose foreign-trade zone and a foreign trade subzone is that the former must be made available for use to multiple entities which desire to operate within a foreign-trade zone. If a company is unable to operate within a general purpose foreign-trade zone, a foreign-trade subzone can be established for the use of a single specific company. *See Citgo Petroleum Corp. v. United States Foreign Trade-Zones Board*, 83 F.3d 397, 399 (Fed. Cir. 1996); *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 884 F.2d 1375, 1375-76 (Fed. Cir. 1989) (quoting *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 12 CIT 737, 738, 693 F.Supp. 1183, 1185 (1988)); *Armco Steel Corp. v. Stans*, 431 F.2d 779, 788-89 (2d Cir. 1970).

Appendix B

Four types of shipments are listed on the CF 349 for which HMT payments must be made on a quarterly basis: exports, domestic movements, passengers, and FTZ admissions. As the party admitting foreign goods into a FTZ, BMW has been filing CF 349s with its HMT payments for its FTZ admissions of foreign merchandise in the manner prescribed by Customs Regulation § 24.24(e)(2)(iii).

BMW commenced this civil action challenging the imposition and collection of the HMT on the foreign goods it has admitted into its Spartanburg FTZ. BMW's amended complaint raised four causes of action. Three of the causes of action — the severability claim, the Port Preference constitutional claim and the Uniformity constitutional claim—have not been briefed, and plaintiff does not desire to brief them in this action. Rather, plaintiff relies on the presentations in other test cases and raises the claims protectively. The court has recently found these three legal theories wanting and has dismissed a test case based upon them for failure to state a claim. *See Amoco Oil Co. v. United States*, No. 95-07-00971 (Ct. Int'l Trade Sept. 1, 1999). The court adopts that opinion for purposes of this case.

III. Discussion

Plaintiff's argument relies on two premises, the first of which is not disputed. First, Customs duties on imports are not paid upon admission to a FTZ. Rather, they are paid if the goods exit the FTZ for entry into the Customs Territory of the United States. *See* 19 U.S.C. § 81c(a). Second, section 4662(f)(1) of Title 26 requires the HMT to be treated as a customs duty for administrative and enforcement purposes,

and 19 U.S.C. § 1528 requires that a tax is to be construed as a customs duty if it is to be treated as a customs duty. Ergo, plaintiff argues that Customs regulations requiring collection of the HMT on admission into a FTZ violates statutory law. *See* 19 C.F.R. § 24.24(e)(2)(iii) (requiring HMT to be paid on admission to the FTZ by the party responsible for admission).

A. *Liability upon unloading for HMT on goods admitted to FMZ*

The starting point is the HMT statute. It specifies that HMT is to be paid on "any port use" in "an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. § 4461(a) & (b). The statute specifies that the fee

> shall be paid by —
>
> (A) in the case of cargo entering the United States, the importer,
>
> (B) in the case of cargo to be exported from the United States, the exporter, or
>
> (C) in any other case, the shipper.

26 U.S.C. § 4461(c). Liability attaches, for port use other than exportation, "at the time of [cargo] unloading." 26 U.S.C. § 4461(c)(2)(B).

Congress expressly exempted certain port use from the fee. Congress created a "[s]pecial rule for Alaska, Hawaii,

and possessions." 26 U.S.C. § 4462(b). *See Amoco*, slip op. at 14-15 (given the dependence of Alaska and Hawaii on shipping, the exemption equalizes burdens among the states). Congress also expressly exempted "bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. § 4462(d)(1). The facts of this matter give rise to neither exemption and the statute does not include specific exemption for cargo that is admitted into a foreign trade zone after unloading at a covered port.

As there is no express exemption applicable to its goods in the act establishing the HMT, plaintiff must rely on the FTZ statute to provide relief. That relief is available only if the HMT is a customs duty.

As recently stated, however, in *Texport Oil Co. v. United States*, Nos. 98-1352, 98-1353, 98-1373, 1999 WL 538186, at *6 (Fed. Cir. July 27, 1999), "The HMT is a generalized Federal charge for the use of certain harbors." It is also codified in the Internal Revenue Code. It is not by its nature a customs duty. Further, by itself, 26 U.S.C. § 4462(f)(1) does not make the HMT a customs duty. It merely states, in relevant part:

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty.

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To treat something for administration and enforcement, as something else, does not make it that other thing for all purposes. Congress could easily have said the HMT was a "customs duty" or a "customs duty for all purposes"; it did not do so.

The next issue is whether 19 U.S.C. § 1528 provides the necessary link. It states, in relevant part:

> No tax or other charge imposed by or pursuant to any law of the United States shall be construed to be a customs duty for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty or contains a provision to the effect that it shall be treated as a duty imposed under the customs laws.

As the previous discussion indicates, Congress did not designate the HMT a customs duty. Is it enough that it is treated as a duty for administration and enforcement? The answer is "no." To be treated as a duty for purposes of the Customs laws denotes a much broader and more substantive treatment than treatment for mere administration or enforcement purposes. *See U.S. Shoe Corp. v. United States*, 20 CIT 206, 208 (1996) (purpose of 26 U.S.C. § 4462(f)(1) was to specify which agency has responsibility for collecting and processing HMT payments).

Plaintiff also ignores the purpose of § 1528. Its purpose is "to make it clear that preferences and exemptions applicable to customs duties [are not applicable] to internal

revenue taxes unless Congress expressly [says] so." *United States v. Westco Liquor Prods. Co.*, 38 CCPA 101, 107 (1951). Congress has not said expressly that FTZ exemptions are applicable to the HMT. The language of 26 U.S.C. § 4462(f)(1) does not satisfy the express language requirement of 19 U.S.C. § 1528. *Cf. Chicago Heights Distrib. Co. v. United States*, 55 Cust. Ct. 254, 259 (1965) (distinguishing "collection purposes" from an "exemption" or "preference" covered by § 1528).

Furthermore, plaintiff's construction is at odds with the purpose of the HMT. Although constructed as an *ad valorem* tax on merchandise, the purpose of the HMT is to charge for port use. *See Texport*, 1999 WL 538186, at *3. The HMT applies whether the goods are exported, imported or shipped between domestic ports. *See id.* To have goods escape the HMT,[4] even though the port use is the same as for other goods, is not within the intent of Congress.[5] In addition, to

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4. Under plaintiff's interpretation goods may "escape" the HMT because those products entering the FTZ duty-free need not be later imported into the Customs territory of the United States. *See, e.g., Citgo*, 83 F.3d at 399 ("a company that ships raw materials into a foreign-trade zone, processes the raw materials into finished products, and then exports the finished products is not required to pay duties on the raw materials, as they are deemed never to have entered the customs territory of the United States").

5. The one exception to this general intent states that the Harbor Maintenance Tax "shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. § 4462(d)(1). Legislative history supports the conclusion that this exception addressed particularly

(Cont'd)

further its purpose, Congress provided that the HMT is to attach at the time of unloading (except for exports). 26 U.S.C. § 4461(c)(2)(B). To delay liability until the goods (as entered or transformed) leave the FTZ and *perhaps* enter the United States Customs territory conflicts with this express provision.[6]

Accordingly, the court concludes the HMT must be paid on goods unloaded at covered ports for admission into FTZs, in accordance with 19 C.F.R. § 24.24(e)(2)(iii). The only question remaining is whether the payor specified in 19 C.F.R. § 24.24(e)(2)(iii) is the one provided by statute.

B. *Person responsible for HMT on merchandise admitted into FTZ*

The answer to the question now posed depends in part on whether merchandise admitted into an FTZ is cargo "entering the United States." 26 U.S.C. § 4461(c)(1)(A). In

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competitive concerns not implicated by the issue at hand. S. Rep. No. 228, at 229-30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6742 (exempting "bonded cargo entering the U.S. for transportation and direct exportation to a foreign country. This exemption does not apply (a) if Canada imposes a similar port use charge or (b) to U.S. ports (or classes of cargo) if the mandated cargo diversion study . . . shows that the charge is not likely to result in a significant diversion of cargo or that the nonapplicability of the charge to a given U.S. port would cause economic harm to another U.S. port").

6. Plaintiff's contention that HMT is *paid* quarterly, not at the time of unloading, is irrelevant. Liability attaches at unloading, before goods can be made into new products in the FTZ.

such a case the HMT is to be paid by the "importer." If it is not, the HMT is to be paid by the "shipper." 26 U.S.C. § 4461(c)(1)(C).[7]

If the statute stated "entering the Customs Territory of the United States," this matter would be largely resolved. The goods, not being unloaded for immediate entry into the United States Customs Territory, but being an "other case," would give rise to shipper liability. Of course, the statute dispenses with these fine words of art and merely states "entering the United States." At first, it is not easily decipherable whether Congress meant the geographical United States or its Customs Territory. The word "entering," which is common Customs parlance, implies that the Customs Territory is meant, but it is a mere implication, and not a strong one at that. As defendant points out, the word "enter" has also been used in reference to admission to an FTZ. *See e.g.*, *Nissan Motor Mfg. Corp.*, 12 CIT at 744, 693 F. Supp. at 1189 ("right to enter production machinery into [a] zone without paying duty."); *see also* S. Rep. No. 81-1107, at 1 (1949), *reprinted in* U.S.C.C.A.N. 2533, 2533 (referring to merchandise "entered" into an FTZ).

Plaintiff notes on the other hand, that for several excise tax purposes "United States" is defined to include specifically FTZs. *See* 26 U.S.C. §§ 4612(a)(4)(C) (1994) and 4682(e)(2) (1994). It also notes that there is no specific inclusion of

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7. The court also does not decide whether liability attaches if bonded sealed merchandise enters an FTZ. This case does not present such a factual scenario. Nor is the court concerned as to whether Customs' forms support the court's reading of the statute. The forms, like the regulations, must conform to the statute, not the converse.

FTZs in the more general definition of "United States" found at 26 U.S.C. § 7701(a)(9) (1994). This is a strong argument. Congress clearly knows how to include FMZs in the definition of the United States for tax purposes, if it so chooses.

Further, who the "importer" is when there is no actual importation or attempted importation is a somewhat difficult question to answer. Customs argues that its regulations answer the query by defining importer as "the person . . . responsible for bringing merchandise into the zone." 19 C.F.R. § 24.24(e)(2)(i). In fact, the regulations do not state that this is a definition of "importer." Customs' general regulation does not include this as a category of "importer."[8]

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8. 19 C.F.R. § 101.1 (1999) defines importer as:

> [T]he person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf. The importer may be:
>
> (1) The consignee, or
>
> (2) The importer of record, or
>
> (3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or
>
> (4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with subpart C of part 144 of this chapter.

Appendix B

As HMT must be paid on the FTZ admissions, one might ask, who pays the HMT if there is no "importer" for FTZ admissions? As indicated, except for imports and exports, the shipper is liable for HMT. 26 U.S.C. § 4461(c)(1)(C). With regard to domestic shipments, Customs' regulations indicate a shipper is the party paying the freight. 19 C.F.R. § 24.24(e)(1)(i). As a shipper is a person responsible for procuring movement of goods,[9] this regulatory definition comports with common meaning. Unlike "importer," there is no general regulatory definition of "shipper."

The person paying the freight, however, may be either the seller or buyer.[10] With domestic shipments, this creates no problem, but as to shipments into an FTZ a collection problem might arise if the person responsible for the freight is interpreted to be the foreign seller.[11]

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9. Black's Law Dictionary defines "shipper" as:

> One who ships goods to another. One who engages the services of a carrier of goods. One who tenders goods to a carrier for transportation; a consignor. The owner or person for whose account the carriage of goods is undertaken.

Black's Law Dictionary 1378 (6th ed. 1990).

10. Under a carriage, insurance, and freight ("C.I.F.") contract, the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. Black's Law Dictionary 242. If the contract has a free on board ("F.O.B.") delivery term, the seller ships the goods and bears the expense and risk of loss to the F.O.B. point designated. *Id.* at 642.

11. One might argue that the buyer always pays the freight,

(Cont'd)

Appendix B

The parties declined to brief the issue of shipper liability and have not advised if the plaintiff paid the freight on the FTZ admissions at issue, or whether the sales contracts placed responsibility for freight with the seller. In any case, the court doubts that any reasonable interpretation of the statute would permit the shifting of liability, by means of a simple contractual arrangement, beyond Customs' practical ability to collect the HMT.

In accordance with Customs' broad authority to design procedures for collection of HMT, it may be permissible for Customs to require that the person responsible for admission to an FTZ assure that the HMT payment is made. This may be so even if another party was responsible, pursuant to contract, for the freight payment, and is, therefore, nominally the "shipper."

The statute is not entirely clear as to which party is responsible for HMT on admissions into an FTZ. In such a case, the court must examine the reasonableness of the agency's interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *see also United States v. Haggar Apparel Co.*, 119 S.Ct. 1392, 1400 (1999) (*Chevron* analysis to be applied to Customs classification if Customs promulgates regulation interpreting ambiguous statute). While the interpretation of

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because in a C.I.F. contract the price paid by the buyer includes the freight and in an F.O.B. contract, the freight is paid directly by the buyer. *See* John H. Jackson, William J. Daley, & Alan O. Sykes, Legal Problems of International Economic Relations 54 (3d ed. 1995) (comparing responsibilities under C.I.F. and F.O.B. terms).

the statute presented to the court by the government is not particularly convincing, the regulations themselves may reasonably carry out the statute by simply providing that the person responsible for FTZ admission pay the HMT. As indicated, the court is unaware if plaintiff paid the freight charge, in which case plaintiff would be liable, no matter which interpretation of the statute the court accepts.

Accordingly, the parties will inform the court within 20 days hereof if there is agreement as to plaintiff's responsibility for HMT under this opinion. If no further dispute exists, the parties shall submit a form of judgment. If a dispute exists, a briefing schedule shall be submitted.

s/ Jane A. Restani
Jane A. Restani
JUDGE

Dated: New York, New York
This 14th day of September, 1999.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DATED SEPTEMBER 30, 1999

Slip Op. 99-102

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

Court No. 97-03-00396

BMW MANUFACTURING CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

The parties have advised the court that plaintiff paid the international shipping charges for the merchandise that was the subject of Slip Op. 99-95. Therefore, this case presents no controversy as to whether the importer, as opposed to the shipper, is liable for Harbor Maintenance Tax payments on goods admitted to a foreign trade zone. If there is "importer" liability under 26 U.S.C. § 4461(c), plaintiff would be such an importer. If there is "shipper" liability, the parties have agreed that plaintiff fits the regulatory definition of shipper.

Appendix C

Accordingly, plaintiff was liable for the payments it made and judgment is entered for defendant.

s/ Jane A. Restani
Judge of the United States
Court of International Trade

Dated: New York, New York
This 30th day of September, 1999.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 9, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 16, 2001.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: May 9, 2001

BMW MANUFACTURING CORP V US, 00-1135
(CIT – 97-03-00396)

APPENDIX E — STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 19 U.S.C. § 81c(a) provides, in relevant part:

(a) Handling of merchandise in zone; shipment of foreign merchandise into customs territory; appraisal; reshipment to zone

Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise: * * *

2. 19 U.S.C. § 1528 provides:

No tax or other charge imposed by or pursuant to any law of the United States shall be construed to be a customs duty for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty or contains a provision to the effect that it shall be treated as a duty imposed under the customs laws. Nothing in this section shall be construed to limit or restrict the jurisdiction of the United States Court of

International Trade or the United States Court of Appeals for the Federal Circuit.

3. 26 U.S.C. § 4461 provides:

(a) General rule. — There is hereby imposed a tax on any port use.

(b) Amount of tax. — The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax. —

(1) Liability. — The tax imposed by subsection (a) shall be paid by —

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition. — Except as provided by regulations, the tax imposed by subsection (a) shall be imposed —

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

4. 26 U.S.C. § 4462(f)(1) provides:

(f) Extension of provisions of law applicable to customs duty. —

(1) In general. — Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

5. 19 C.F.R. § 24.24(e)(2) provides:

(2) *Import vessel movements* — (i) *Time and place of liability.* Subject to the exemptions and special rules of this section, when imported cargo is unloaded from a commercial vessel at a port within the definition of this section, and destined for either consumption, warehousing, or foreign trade zone admission, the importer of that cargo, or in the case of foreign trade zones, the person or corporation responsible for bringing merchandise into the zone, is liable for the payment of the port use fee at the time of unloading. The fee is based on the U.S. Customs appraised value of the shipment pursuant to 19 U.S.C. 1401a, the same basis as that used for duty payment. The fee shall be collected on all

formal entries, including warehouse entries and temporary importation under bond entries, and admissions into foreign trade zones.

(ii) *Fee payment.* The port use fee on unloading of imported cargo shall be paid in accordance with the normal Customs collection procedures set forth in §§ 24.1 and 141.1 of this chapter, except as provided for merchandise admitted into foreign trade zones in paragraph (e)(3)(iii) of this section. The U.S. Customs Entry Summary Form (Customs Form 7501), is to be completed with the amount of the fee shown and identified on the form. The fee shall be paid by the importer by adding it to any normal duty, tax or fee payable at the time of formal entry processing. If no other duty, tax, or fee is imposed on the shipment, and the fee exceeds $3, a check or money order for the amount of the fee shall be attached to the Customs entry forms submitted.

(iii) *Foreign trade zones.* In cases where imported cargo is unloaded from a commercial vessel at a port within the definition of this section and admitted into a foreign trade zone, the applicant for admission (the person or corporation responsible for bringing merchandise into the zone) who becomes liable for the fee at the time of unloading pursuant to paragraph (e)(3)(i) of this section, shall pay all fees for which he is liable on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for the quarter and a Harbor Maintenance Fee Quarterly Summary Sheet, Customs Form 349, to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915. Fees shall be paid for all shipments unloaded and admitted to the

zone, or in the case of direct deliveries under §§ 146.39 and 146.40 of this chapter, unloaded and received in the zone under the bond of the foreign trade zone operator.

6. 19 C.F.R. § 24.24(f) provides:

(f) *Quarterly payments*. All quarterly payments required by this section must be received no later than 31 days after the close of the quarter being paid. Quarterly periods end on the last day of March, June, September, and December.

* * * *

APPENDIX F — PARTIAL LISTING OF COMPANIES OPERATING IN FOREIGN-TRADE ZONES IDENTIFIED IN 61ST ANNUAL REPORT OF THE FOREIGN-TRADE ZONES BOARD

Abbott Laboratories
ADDSCO
Alcatel Submarine Networks
Alco
Alfa Laval Distribution
Alliant Aerospace Composite Structures Co.
Alpine
Alps Manufacturing
Amoco Chemical Company
Amoco Oil Company
Artesyn Technologies (Inc.)
Ascent Power Technology Corp.
Aso Corporation
AstraZeneca Pharmaceuticals LP
AT&T
AUTECS
Avondale
B&F System
Bally, Inc.
BASF
Bausch and Lomb
Baxter Caribe, Inc.
Bay Shipbuilding Corp.
Bayer Corp.
Bayway Refining Company
Beall Pipe
Ben Venue Laboratories
Berry Contracting, Inc.
Bethlehem Steel Corp.
BMW
Bollinger Shipyards, Inc.
Borg-Warner Automotive Powertrain Systems Corporation
BP Exploration & Oil, Inc.
Bristol-Myers Squibb
Brother Industries
Buffalo China, Inc.
C. Ceronix
CE Nuclear Power LLC, Westinghouse
CN Biosciences, Inc.
Caterpillar Tractor Co.
Cedar Chemical
Chalmette Refinery LLC
Chevron
Chrysler Corp.
Cirrus Logic, Inc.
Citgo
Citizens Communications Company
Clariant Corporation
Clarion
Clark Refining and Marketing
Coastal Eagle Point Oil Co.

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Colin Medical Instruments
Columbia Specialties
Conair Corporation
Conoco
Consolidated Biscuit Company
Cooper Tire and Rubber Co.
CORCO
Cortelco USA
Crown Central Petroleum Corporation
Custom Manufacturing Services, Lucent Technologies, Inc.
Datatape, Inc.
Deere-Hitachi
Degussa
Dell Computer Corporation
Diamond Shamrock Refining Company
Diesel Technology
Dole Processed Food Co.
Dow Chemical Company
Dril-Quip, Inc.
Du Pont
Eastman Kodak
Eli Lilly & Co.
Endress & Hauser
Equilon Enterprises, LLC
Equistar Chemicals LP
Equitable Shipyards
ESCO Company
Exxon Corporation
Fedders North America
Federal-Mogul World Trade, Inc.
Fina Oil Company
Firmenich, Inc.
Flite Technology
Florsheim Shoe Company
Flowline Alaska
Ford
Fossil Partners
Friedrich Air Conditioning and Refrigeration
Frontier El Dorado Refining Company
Fuji Photo Film, Inc.
Fijitsu Ten Corp. of America
General Electric
General Motors
Giant Products
Gleason Corp.
Global Power
Globe Metallurgical, Inc.
Goodman Manufacturing
Gowan Company
Group Technologies Corporation
Gulf Coast Maritime
Gulf Marine Fabricators
Gymboree Corporation
Halter Maine, Inc.
Harris Corporation-Electronic Systems Sector

Appendix F

Henkel Corporation
Hewlett-Packard
Hitachi
Hoffman-La Roche
Honda
Hydril Company
IBM
Imation Corporation
Ingalls
Intel Corporation
International Flavors and Fragrances
IPR Pharmaceuticals
J. Schoeneman
Jeep Corporation
JVC America, Inc.
Kawasaki
Kerr Pacific Corp.
Koch Petroleum Group, L.P.
Komatsu America Int'l Company
Kvaerner Philadelphia Shipyard, Inc.
Lamb-Grays Harbor
Lawrence Textiles
Lexmark International Inc.
Lilli Ann
Lincoln Electric Company
LOOP
Lucent Technologies
LYONDELL-CITGO Refining Company
MagneTek, Inc.
Mallinckrod Medical
Marathon Ashland Petroleum LLC
Massachusetts Heavy Industries, Inc.
Maui Pineapple Co., Ltd.
Maytag
Mazda
Mead Johnson & Company
Meadowcraft, Inc.
Mercedes-Benz
Merck & Co.
Mercury Marine
Microchip Technology Inc.
Mid States Pipe Fabricating, Inc.
Miles
Milk Specialties
Minnesota Mining & Manufacturing
Mitsubishi Motor Manuf. of America, Inc.
Mobil Corporation
Moss Point Marine
Motch Corporation
Mr. Coffee
Murphy Oil USA, Inc.
Nashua National RV
National Steel and Shipbuilding Co.
New York Air Brake Co.

Appendix F

Newport News Shipbuilding & Dry Dock
Nine West Distribution Corporation
Nissan Industrial Engine
Nissan
North American Lighting and Hella Electronics
North American Shipbuilding
Northern Trading Company
Northrop Grumman Corporation
NUMMI
Oivetti
Oneida Ltd.
Onkyo America, Inc.
Organichem Corporation
Peavey Electronics Corporation
Pedigree
PepsiCo
PETsMART, Inc.
Pfizer Inc.
Phillips Petroleum
Picker International, Inc.
Pier I Imports
Pioneer Industrial Components, Inc.
Plastic Products Company
Polaris Industries
Polaroid
Porsche
Precision Components
Premocor Refining Group, Inc.
Puerto Rico Sun Oil Company
R.G. Barry Corporation
RP Scherer Corporation
Rauch Industries, Inc.
Reilly Dairy & Food
Reynolds Metals
Robin Manufacturing U.S.A. Inc.
Rotorex Company
Sanden International
Sanofi Winthrop
Sanyo
Sargento Foods, Inc.
Saturn Corp.
SB Pharmco Puerto Rico, Inc.
Searle & Company
Searle, Ltd.
Seaway Crude Pipeline Company
Seaway Crude Pipeline
SGS-Thomson Microelectronics
Shaffer, Inc.
Sharp Mfg. Co.
Shell Chemical LP
Shell Oil
Siemens Energy and Automation
SMC Pneumatics
Smith-Corona

Appendix F

SmithKline Beecham
Sony Magnetic Products
SP Pharmaceuticals LLC
Squibb
Star Enterprise
Storage Technology
Subaru-Isuzu
Sumitomo Sitix of Phoenix, Inc.
Sun Company
Sunoco
TOR Minerals Intl
Tacoma Boatbuilding
Tadiran Microwave Networks, Inc.
TEPPCO Crude Pipeline LP
Tesoro Hawaii Corporation
Tesoro Northwest
Tetra Pak Parts Americas
Thomson Consumer Electronics
Tofle U.S.A.
Tosco Corporation
Toscopetro Corporation
Toyota
TransAmerican
Trifinery Petroleum Services
Tuboscope Vetco International
TVA Hartsville Nuclear Plant
Ultrak, Inc.
Unifi, Inc.
United General Supply
United Technologies Corporation
UNO-VEN Company
US Department of Energy Oil Storage
Valero
Verosol USA, Inc.
VW
Wal-Mart
Wascator Manufacturing Company
West Coast Forest Products
Winnebago Industries, Inc.
Wirsbo Company
Wisconsin Dairies
Wyeth Nutritionals
Xerox Corp.
Yamaha
Yulshin
Zeneca Inc.
ZF Industries, Inc.

APPENDIX G — CUSTOMS HEADQUARTERS RULING 227638 DATED NOVEMBER 30, 1998

HQ *227638*

November 30, 1998

FOR-2-03/FOR-2-04-RR:CR:DR *227638* IOR

CATEGORY: Foreign-Trade Zones

U.S. Customs Service
Office of Field Operations
Foreign Trade Zone Program Manager
1300 Pennsylvania Avenue, N.W., Room 5.2B-55
Washington, D.C. 20229
ATTN: William J. Kotlowy

RE: Foreign-trade zones; privileged foreign status; Angolan petroleum feedstock; merchandise processing fees; exemption; beneficiary developing country; HTSUS, General Note 4(b); 19 U.S.C. 58c; 19 U.S.C. §81c; 19 CFR 24.23; 19 CFR 146.65(a)(1); Inter-Maritime Fwd. Co., Inc. v. U.S.

Dear Sir:

This is in response to your request for internal advice of July 24, 1997 [FOR-FO:TC:C:C MS], forwarding a July 17, 1997 request from Arthur Andersen LLP on behalf of Valero Refining Company ("Valero"), that certain previously entered merchandise be exempt from the merchandise processing fee (MPF).

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FACTS:

On August 1, 1996, on a CF 214 (Application for Foreign-Trade Zone Admission and/or Status Designation Final) Valero applied for the admission of 369,838 barrels of Angolan petroleum feedstock into its foreign trade zone ("FTZ") subzone in Corpus Christi, Texas, in privileged foreign status (19 CFR 146.41). The application was approved on August 7, 1996, and the CF 214 indicates that the merchandise was received at the zone on August 4, 1996. The CF 214 shows that the value of the merchandise was $5,631,765.00, and the pro forma invoice indicates the same value and shows the amount of user fee due as $11,826.71. The Customs Regulations 24.23(b) (19 CFR 24.23(b)) provide that the fee for processing merchandise (MPF or user fee) is 0.21 percent of the total value of the merchandise, and is not to exceed $485 and is not to be less than $25.

According to CF 7501s, and Customs records, from August 1, 1996 (CF 7501 dated August 14, 1996) through May 1, 1997 (CF 7501 dated May 15, 1997), Valero entered the subject merchandise for consumption, in seven different entries. Each of the seven entries included other merchandise as well. The MPF for each of the seven entries was calculated at 0.21 percent per entry, and $485.00 was collected per entry for a total of $3,395.00.

On January 1, 1997, Angola was designated as a least-developed beneficiary developing country (BDC). See General Note 4(b), Harmonized Tariff Schedule of the United States (HTSUS). This designation entitles an importer of merchandise that is "the growth, product or manufacture"

of Angola to duty-free treatment upon the direct importation from Angola into the customs territory of the United States. Id. Moreover, pursuant to 19 CFR 24.23(c)(1)(iv), products from BDCs are exempt from the MPF payment requirement of 19 CFR 24.23(b). Accordingly, Valero contends that the Angolan feedstocks entered after January 1, 1997 (entry numbers PQ1-xxxx108-6, dated April 24, 1997, and PQ1-xxxx110-2, dated May 1, 1997), should be exempt from the MPF. Your internal advice request refers to the Valero inquiry as a refund application, however Valero's inquiry refers to an exemption as opposed to a refund.

In the two 1997 entries, the 0.21 percent MPF is calculated based on the value of the Angolan feedstock as well as the other merchandise. For the April 24 entry, 0.21 percent of the total entered amount for MPF is $7,273.12, and the MPF calculated on the Angolan feedstock alone is $759.42. For the May 1 entry, 0.21 percent of the total entered amount for MPF is $7,439.66, and the MPF calculated on the Angolan feedstock alone is $304.98.

ISSUE:

Whether Angolan petroleum feedstock, admitted into an FTZ under privileged foreign status prior to attaining status as a product of a BDC, is exempt from MPF upon entry into Customs territory, which occurs subsequently, when the merchandise is considered a product of a BDC.

LAW AND ANALYSIS:

With regard to the assessment of the ad valorem MPF, 19 U.S.C. §58c(a)(9)(A) provides that the Secretary of the

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Treasury shall charge and collect an ad valorem fee for the processing of merchandise that is formally entered or released. Regulation 19 CFR 24.23(b)(1)(i)(A) provides that "merchandise that is formally entered or released" is subject to an MPF, which is due and payable "at the time of presentation of the entry summary and shall be based on the value of the merchandise." In this case, entry summaries were filed between August 14, 1996 and May 15, 1997. As stated above, two of the entries were made in 1997, after Angola was designated a BDC.

With respect to merchandise transferred from an FTZ to customs territory, 19 CFR 146.65(a)(1) provides that "[p]rivileged foreign merchandise provided for in this section will be subject to the tariff classification according to its character, condition and quantity, at the rate of duty and tax in force on the date of filing, in complete and proper form, the application for privileged status." Valero submitted the application for privileged status on August 1, 1996. Thus, pursuant to 19 CFR 146.65(a)(1), the merchandise was subject to the rate of duty and tax in force on this date. As stated above, Angola was not designated a least-developed BDC until January 1, 1997. See General Note 4(b), HTSUS. Therefore, the duty-free rate presently applicable to Angolan merchandise was not applicable at the time the application for privileged status was made.

Valero takes the position that the MPF is not a "duty" or "tax," as described in 19 CFR 146.65(a)(1), and therefore the correct date to assess the MPF is not the date of application for privileged status, but the date the entry summary is presented to Customs, pursuant to 19 CFR

24.23(b)(1)(i)(A). It is Valero's position that products entered after January 1, 1997 should be exempt from the MPF. It is provided in 19 U.S.C. §58c(g)(2) that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations, other than those laws and regulations relating to drawback, shall apply with respect to [the merchandise processing fee] prescribed under subsection (a) of this section, . . . as if such fee is a customs duty (emphasis added)." See also 19 CFR 24.23(e)(1), which implements the statute.

The provision in 19 U.S.C. §58c(g)(2) thus requires a determination whether 19 CFR 146.65(a)(1) is an administrative or enforcement provision of the customs regulations. The legislature delegates to administrative agencies "the power to make rules and regulations to implement a statute." 2 Am. Jur. 2d Administrative Law §152 (1994). The Secretary of the Treasury is authorized the superintendence of the collection of duties on imports "as he shall judge best", in 19 U.S.C. §3. Section §58c(a), authorizes and directs the Secretary of the Treasury to charge and collect the fees listed in the statute. The phrase "all administrative and enforcement provisions" is broad and includes the Customs Regulations and most of the statutes administered and enforced by Customs. The phrase appears frequently in statutes, however has been rarely, if ever, interpreted or defined. It would seem that the phrase refers to the authority delegated by the legislature to the applicable agency. For example, according to the language in 19 U.S.C. §58c(g)(2), quoted above, a provision pertaining to a Customs duty in the Internal Revenue Regulations or statutes, most likely would not also apply to the MPF, unless another

statute specifically included it as was done in 19 U.S.C. §58c(g)(2), but with respect to Internal Revenue laws and regulations.

Generally, the reference to administrative and/or enforcement provisions of an agency, seems to be to those statutes and regulations which pertain to the powers delegated to the agency, by the legislature. See e.g., U.S. v. Hunter, 80 F.2d 968, 970-971 (5th Cir. 1936); Springfield Industries Corp. v. United States, 11 C.I.T. 331, 332, 341 (1987); United States Shoe Corporation v. United States, 114 F.3d 1564, 1569, 1571 (Fed. Cir. 1997). In Sturges v. Clark D. Pease, Inc., 48 F.2d 1035 (2d Cir. 1931), the Court distinguished between "administrative provisions" which are to be applied by the Secretary of the Treasury, and those provisions for injunctive relief, which are intended to be enforced only by a court. In Werner G. Smith Co. v. United States, 40 C.C.P.A. 90, 94-95 (1952), the Court distinguished between "administrative provisions" and "duty-levying provisions" of the Tariff Act of 1930, in the context of amendments that were made by the Customs Administrative Act of 1938 ("the act of 1938 not only amended certain administrative provisions of the 1930 act, but also changed certain of its duty-levying provisions"). Senate report No. 1465, 75th Congress, 3rd Session, of the Senate Finance Committee on the 1938 act, stated the purpose of the act:

> Besides the primary purpose of facilitating more efficient administration of the customs laws, the other major purposes of H.R. 8099 may be briefly summarized as follows:

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(1) To restate the customs and other laws with the administration of which the Customs Service is charged, in certain instances where this may be profitably done in such a manner as will simplify their interpretation and administration.

(2) To fill in gaps in existing law to relieve administrative difficulties.

(3) To suppress abuses which have, in a few instances, grown up under existing law, and which cannot be corrected by administrative practice.

(4) To liberalize the laws in certain desirable respects where this will facilitate administrative efficiency without jeopardizing the revenue of the United States or the interests of the public.

Id., at 6-7. The provisions which were the subject of the Administrative Act of 1938, included Tariff Act of 1930 sections 304 (marking), 308 (temporary free importation under bond, repealed in 1962), 309 (supplies for vessels and aircraft), 460 (penalties for failure to report or file manifest, repealed in 1986), 516 (petitions by domestic interested parties), 520 (refunds and errors), and 623 (bonds and other security). These are examples of the types of provisions which are "administrative" provisions. Despite the language in Werner G. Smith Co., according to the Senate Report "the bill is an administrative bill" and "[i]t does not deal with duty rates." Id., at 6. Apparently duty rates are one type of provision which is not considered to be an "administrative" provision.

Finally, in delegating the collection, administration and enforcement of the Harbor Maintenance Fee to the Customs Service, as part of the Comprehensive Water Resources Development Act of 1986, Pub. L. No. 960622, 100 Stat. 4082 (codified at 26 U.S.C. §4461), the House Report described the Tariff Act of 1930, as amended, and the Customs Regulations, as having already "set out detailed rules and procedures for the classification and appraisal of imported merchandise and for the administration and enforcement of customs laws." H. Rep. No. 99-228 (1986), reprinted in 1986 U.S.C.C.A.N. 6705, 6714. The legislature viewed administrative and enforcement provisions of customs laws as including the collection of duties.

Part 146 of the Customs Regulations (19 CFR 146), implements 19 U.S.C. §81c:

> This part 146 of the Customs Regulations governs the admission of merchandise into a foreign trade zone; . . . and transfer of merchandise from a zone into Customs territory.

From the plain language of section 58c(g)(2), then, we conclude that the regulation, 19 CFR 146.65(a)(1), which provides for the method of determining under which classification and rate of duty privileged foreign merchandise is subject for purposes of collecting the appropriate duties, constitutes an administrative provision of the Customs regulations. The regulation does not establish the classification and set the duty rate. The classification and duty rate is set by the Harmonized Tariff Schedule of the United States. Similarly, the provision for assessment of additional duties for failure to mark, 19 U.S.C. § 1304(h)

(§1304(c) at the time of the 1938 act), was specifically included in the administrative act. Thus, 19 CFR 146.65(a)(1) is an administrative provision of Customs regulations, and for the purposes of that regulation, MPFs are treated as customs duties, in accordance with 19 U.S.C. §58c(g)(2).

The authorization to grant the privilege to establish, operate and maintain an FTZ is provided by 19 U.S.C. §81b(a). The legislation proposing FTZ's was discussed in the legislative history of earlier bills for the establishment of foreign trade zones. In the hearings before the House Committee on Ways and Means, on H.R. 9778, October 10 and 11, 1919, p. 139, William Kent, a member of the Tariff Commission, stated that the proposed legislation "merely carries out in betterwise, and with greater economy, the necessarily established purpose of the Government not to tax or to attempt to tax goods going into export." In the hearings before the Senate Subcommittee of the Committee on Commerce, on S. 3170, October 10, 11, and 21, 1919, p. 5, in his testimony, Mr. J.J. Dwyer, manager of the Port Development Department of the San Francisco Chamber of Commerce, stated the purpose of the bill was "to expedite and encourage foreign commerce, and for other purposes", and as follows:

> The central idea of the bill and the feature that we desire to adopt from European practice is the exemption of the vessel and of the goods or articles brought into the zone while they are in the zone from all customs control or supervision, with the exception of precautions against smuggling. . . .

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The objective was that Customs would not be involved with any merchandise in the zone, unless and until it entered Customs territory.

The reference to legislative history for bills other than the one eventually enacted is appropriate, as the proposed legislation essentially remained the same. House Report 1521, 73d Congress, 2d session, p. 3, for H.R. 9322, which was enacted June 18, 1934, includes a statement from the Secretary of Commerce, in support of the establishment of FTZ's, that "[t]hese bills appear to be identical with the one that had been introduced annually for a number of years."

Because of the objective that Customs would not be involved with merchandise in the zone, the bills proposed in 1919 did not include a provision for privileged merchandise. Imported merchandise, entered into customs territory from the FTZ was to be appraised and liquidated upon entry into customs territory. In the hearings before the House Committee on Ways and Means, on H.R. 9778, October 10 and 11, 1919, pp. 8-9, a summary of the report of the United States Tariff Commission stated with respect to section 3, that it provides:

> [G]oods from the zone entering into customs territory of the United States shall pay duties as though originating in a foreign country. This procedure is a handicap against the zone, as compared with customs territory, inasmuch as not only the imported goods must pay full duty, but duty must be charged, based upon their manufactured form, without crediting domestic materials with rebate or giving credit for American manufacturing operations performed in the zone.

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In his statement before the Committee, Mr. Kent explained how merchandise manufactured in the zone would be treated upon entry into customs territory:

> We adopted what I believe is the Hamburg theory, and that is that a free zone for customs purposes, you will find in the bill, is specifically considered as foreign territory. If you have foreign rubber and domestic cotton in the zone, and hose made out of the combination, the duty is collected on the hose, and there is no levey on the cotton. It goes through the customs and then to the interior of the country as a manufactured article manufactured in a foreign territory, for customs purposes. . . .

Id., at 141-42. In the hearings before the Senate Subcommittee of the Committee on Commerce, on S. 3170, supra, the concept of and need for privileged status foreign merchandise was discussed, on pp. 96-105, in the testimony of Mr. George W. Ashworth, Chief of the Division of Customs, Treasury Department. The discussion concerned the fact that foreign merchandise entering customs territory from the vessel at the dock and foreign merchandise entering customs territory from the FTZ would be appraised differently, because Customs would have no record of when the merchandise in the zone was imported from the foreign country, and would not have a value upon which to base appraisal. As a remedy, to the discrepancy in appraisement, Mr. Kent proposed:

> [I]t was our intent that a man bringing a vessel into the zone by showing his consular invoice

> could carry his goods through the customs gate of the zone with equal facility as he could carry it through the customs gate in customs territory — that portion of his cargo for which he showed his consular invoice and which was segregated and identified and which was intended for that purpose. So there would be equality through the customshouse for a vessel that came through customs territory and a vessel that came into the zone for stuff intended for immediate transportation into the interior.

Id., at 98. The discussion in the hearings questioned whether under the proposed bill, Customs had the authority to appraise merchandise as it enters the zone, even if requested by the importer, and whether provision should be made for such authority. Id., at 99. It was agreed that the usefulness of the zone would be greatly diminished "unless we devise a system whereby the duties will be the same for goods coming through the zone into customs territory and goods landing directly in customs territory." Id., at 101. In the discussion it was proposed that the burden of proof of the origin of the merchandise falls upon the importer, and that the one thing that cannot be accommodated is "a man changing his mind as to what he wants to do with his goods." Id., at 104-105. In the legislation ultimately enacted, a provision for privileged merchandise was included.

The provision for privileged foreign merchandise is set forth in 19 U.S.C. §81c, in the first proviso:

> That whenever the privilege shall be requested and there has been no manipulation or manufacture

> effecting a change in tariff classification, the appropriate customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be stored, manipulated, or manufactured under the supervision and regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not may, under regulations prescribed by the Secretary of the Treasury, be exported or destroyed, or may be sent into customs territory upon the payment of such liquidated duties and determined taxes thereon. If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on the quantity of such foreign merchandise used in the manipulation or manufacture of the entered article.

Section 3 of the 1934 act (19 U.S.C. §81c(a)), was amended in 1950, to authorize the manufacturing and exhibition of merchandise in FTZ's. The 1950 amendment also eliminated the absolute requirement that the duties for privileged merchandise be paid within a maximum of two years, even if the merchandise was never sent into customs territory. The 1950 amendment did not affect the purpose of the provision for obtaining privileged status for merchandise. In the legislative history on the 1950 amendment, the Senate Report, No. 1107, 1950 U.S. Code Cong. Service, p. 2533, at 2535-36, stated that the finding on taxes and duties on the

merchandise in the zone could be requested at any time until there was a manipulation or manufacture effecting a change in tariff classification, but that such finding could be made only once, and "once made, would thereafter govern the dutiable and taxable status of the merchandise whenever it was sent into customs territory," and the "duties and taxes would be payable in accordance with the finding".

Despite the language in the first proviso of 19 U.S.C. §81c(a), liquidation, within the meaning of 19 U.S.C. § 1500, of the privileged merchandise does not occur until it is entered into Customs territory. The privileged foreign merchandise "liquidations" are not liquidations within the meaning of 19 U.S.C. §1500. See, T.D. 95-35. However, it is clear from the statutory language, the regulations and the legislative history, that the liquidation of the merchandise is based on the rate of duty in force on the date of filing of the application for privileged status. The regulations provide for correction of any misclassification, up to the time the bulletin notice of the liquidation is posted. 19 CFR 146.65(a)(1). There is however no provision for "adjustment" of the duty rate, which as determined above, includes the MPF. Adjustment of the duty rate, for reason other than a correction, would go against the purpose of the privilege, which is to fix the duty rate to that which is applicable at the time the privilege is applied for.

The Customs statute, 19 U.S.C. §1500(c) and (d), requires Customs to "fix" the final amount of duty to be paid on appraised merchandise, and to liquidate the merchandise, under the rules and regulations prescribed by the Secretary. Part 159 of the Customs Regulations (19 CFR 159) provides for the liquidation of entries of merchandise, and in 19 CFR

159.1, defines liquidation as "the final computation or ascertainment of the duties . . . accruing on an entry." Based on the foregoing analysis, the liquidation provisions are administrative provisions, and therefore the term "duty" used therein includes MPF, and the MPF is included in the liquidation of the entry. Although the final computation and ascertainment of duties occurs upon liquidation, it is clear from the statute and the legislative history, that under section 81c(a), the rate of duty applicable at the time of liquidation under section 1500 would not replace that rate applicable at the time the privileged status was granted.

Valero essentially requests that we treat its merchandise as if it had chosen non-privileged foreign status, pursuant to 19 CFR 146.65(a)(2). This section provides that "[n]onprivileged foreign merchandise . . . will be subject to tariff classification in accordance with its character, condition and quantity as constructively transferred to Customs territory at the time the entry or entry summary is filed with Customs." Valero could have applied for this status on the CF 214, but did not. The Customs Regulations provide in 146.41(e) that the status as privileged merchandise is binding and cannot be abandoned. This is consistent with the legislative history in both 1919 and 1950. Just as the duty rate cannot be adjusted for privileged status merchandise, the MPF also cannot be adjusted.

We note that this situation is distinguishable from that involved in Inter-Maritime Fwd. Co., Inc. v. United States, 192 F.Supp. 631 (Cust. Ct. 1961), wherein the court considered the admission of woolen textiles into an FTZ that were given the status of "privileged foreign merchandise."

Appendix G

At the time of the admission into the zone, a tariff quota on woolen textiles was in place but had not yet been met. The merchandise was later withdrawn from the zone and entered for consumption. A portion of the merchandise was entered before the terminating point of the tariff quota, while another was entered after the quota was reached. Customs determined that the portion of the merchandise entered after the quota had been reached was dutiable at the higher, non-quota tariff rate. The court agreed, finding that:

> [T]he quota established for woven woolen fabrics provided not for a single rate of duty, as in the case of ordinary merchandise, but set up a dual rate of duty dependent upon the status of the merchandise when such woolen fabrics were entered for consumption, and the applicable rate for the involved merchandise was not dependent upon the mere fact that the goods were in the foreign trade zone with privileged status.

Id. at 637. The court stated that the effect of privileged status, was to guarantee the importer "against unforeseen future increases in duty while such goods remained in the trade zone, while at the same time protecting Government revenue on such merchandise not entered for consumption so as to obtain the benefit of the quota concession." Id.

The instant case is distinguishable from Inter-Maritime Fwd. Co., in that unlike in tariff quota matters, with respect to MPF there is no dual rate. The MPF either applies or does not apply. The effect of privileged status is not to guarantee the importer the lowest rate available. The purpose, as set forth in the legislative history, is to eliminate any discrepancy

in the liquidation of the entry which may occur by the entry going through the FTZ into Customs territory.

Furthermore, since the Inter-Maritime Fwd. Co. decision, the dual rate for merchandise subject to quota has been addressed in the Customs regulations, 19 CFR 146.65. The revision of the regulations in 1986, added the following language to 146.65(a)(1):

> Classification of merchandise subject to tariff-rate import quota will be made only at the higher non-quota duty rate in effect on the date privileged foreign status was granted.

If any additional provision was intended with respect to MPF or other fees which are treated as duties, it could have been included in the regulations. There is nothing in the statute, legislative history or regulations to indicate that the duties provided for in the first proviso of 19 U.S.C. §81c(a), meant anything other than the duties for purposes of which the MPF and other fees, are treated as duties. If any fee was to be exempt from the proviso, it could have been addressed. Under 19 U.S.C. §58c(g)(2), the only exception to the treatment of the subject fees as a duty, is for purposes of drawback. If such an exception had also been intended for administration of FTZ's, it could have been easily stated in §58c(g)(2).

We note that in Texport Oil Company v. United States, No. 98-21, slip op. (CIT, March 5, 1998) (appeal pending, Nos. 98-1352 and 98-1353), the MPF was clearly stated to be a "fee" as opposed to a "duty" or "tax", with respect to a drawback law. The statute and regulations clearly state that the MPF is to be treated as a "duty" except under laws and

regulations relating to drawback. Therefore, Texport, is not determinative of this matter, and the MPF is to be treated as a Customs "duty" for purposes of 19 CFR 146.65(1). The subject merchandise is not exempt from the MPF assessed.

Even if it were determined that the entered merchandise is exempt from the MPF, although privileged foreign status was applied for upon admission of the merchandise in the FTZ, we do not believe Valero has established that it would be entitled to any refund of MPF. Even if no MPF had been assessed on the Angolan feedstock, Valero still would have owed the maximum $485 MPF per entry, as the $485 cap would have been met by the MPF assessed on the remaining items on the entry.

HOLDING:

Angolan petroleum feedstocks, admitted into an FTZ under privileged foreign status prior to the goods attaining status as products of a BDC, are not exempt from MPF upon entry for consumption of these feedstocks, when entry occurs after the merchandise attains status as products of a BDC.

You are to mail this decision to the internal advice applicant no later than 60 days from the date of this letter. On that date, the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page on the World Wide Web at www.customs.ustreas.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

John Durant, Director

APPENDIX H — CUSTOMS HEADQUARTERS RULING 223430 DATED APRIL 15, 1992

HQ *223430*

April 15, 1992

ENT-1-03-CO:R:C:E *223430* CB/WR

CATEGORY: Entry/Protest

District Director
U.S. Customs Service
Suite 301
4430 East Adamo Drive
Tampa, FL 33605

RE: Application for further review of Protest No. 1801-90-000027 and 180 1-91-000038; 26 U.S.C. 4461; Harbor Maintenance Fee; 19 U.S.C. 1309(a); bonded jet fuel

Dear Madam:

The above-referenced protest was forwarded to this office for further review. We have considered the points raised and our decision follows.

FACTS:

Protest No. 1801-90-000027 is against the assessment of the Harbor Maintenance Fee (HMF) on an importation of jet fuel that was entered on August 29, 1988. Protest No. 1801-90-000038 is against the assessment of the HMF on an importation of jet fuel entered on July 16, 1990. The entry

on the first protest was liquidated on May 25, 1990 and the protest was filed on August 23, 1990, 90 days after liquidation. The entry on the second protest was liquidated on the date of entry, May 10, 1991 and the protest was filed on June 4, 1991, 25 days after the liquidation.

The jet fuel on the first protest was entered into a Customs bonded warehouse. Most of that fuel was withdrawn from the warehouse for exportation as aircraft supplies. There were three withdrawals for consumption from the warehouse. The jet fuel on the second protest was entered into a Customs bonded warehouse. Most of the fuel was withdrawn for exportation as aircraft supplies. There were a few withdrawals for consumption from the warehouse, primarily for volume adjustments.

It is protestant's contention that pursuant to 19 U.S.C. 1309(a) and 26 U.S.C. 4462(d)(1), jet aircraft fuel withdrawn from a bonded warehouse for use as aircraft supplies on an aircraft leaving the United States for a foreign country is not subject to the Harbor Maintenance Fee.

ISSUE:

Whether bonded merchandise which is exported is subject to the Harbor Maintenance Fee?

LAW AND ANALYSIS:

The protests apparently are asserted under 19 U.S.C. 1514(a)(5), questioning the legality of the respective liquidations of the entries. Both protests appear to have been filed within the statutory 90-day period from liquidation.

Appendix H

Under 26 U.S.C. 4462(f), the administrative and enforcement provisions of the Customs laws apply to the HMF. The HMF is imposed on importations at the time of unloading in an applicable port under 26 U.S.C. 4461(c)(2)(A). The HMF does not apply to bonded commercial cargo entering the United States for transportation and direct exportation under 26 U.S.C. 4462(d). The provisions of 19 U.S.C. 1553 control transportation and exportation movements. Inasmuch as both protests involve jet fuel that was entered for warehouse under 19 U.S.C. 1557, rather than a movement through the United States under 19 U.S.C. 1553, the evidence does not support the claim that the exemption provided by 26 U.S.C. 4462(d) applies to either protest.

The alternative claim is that the HMF is a duty or internal revenue tax on the jet fuel when the jet fuel is entered for warehouse. Under 19 U.S.C. 1309 merchandise in a Customs bonded warehouse may be withdrawn free of duty or internal revenue tax. Under General Note 1, Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202) goods imported into the United States are made subject to duty under General Notes 3 and 4, HTSUS. The duty is imposed by reason of importation. 19 CFR 141.1(a). The HMF is imposed by reason of port use under 26 U.S.C. 4461(a), and in this situation, the HMF becomes due at the time of unloading from a vessel in an applicable port. The language in 26 U.S.C. 4462(f) making all administrative and enforcement provisions of the Customs laws and regulations applicable to the HMF as if the HMF were a Customs duty does not transform the HMF into a Customs duty. See also S. Rept. 99-126 (August 1, 1985) page 7, reprinted in

Code Cong. & Ad. News at 6644 (1986). There it is stated that the tax and fees were imposed for the purpose of repayment of costs related to servicing of commerce and not for the purpose of raising revenue. In H. Rept. 99-228 (Jan. 8, 1986) page 3, reprinted in U.S. Code Cong. & Ad. News at 6707 (1986), the purpose of having the Customs Service administer the collection of the HMF was not to create any new substantive fights but rather for reason of administrative and judicial procedures. The stated reason for using the Customs Service was simply because the Customs Service was present at ports. H. Rept. 99-228 (Jan. 8, 1986) page 10, reprinted in U.S. Code Cong. & Ad. News at 6714-6715 (1986).

The next issue is whether the HMF, when imposed on imported merchandise in a Customs bonded warehouse, after that merchandise was unloaded at an applicable port, is an internal revenue tax within the meaning of 19 U.S.C. 1309. There is no one meaning of the term "internal revenue tax". In the case of United States v. Leeb, 20 F.2d 335 (2d Cir. 1927), Judge Swan noted that point. He observed that legislative intent may be defeated by an invariable definition, and that the same word may be used with different meanings in different statutes. The purpose of statutory construction has been developed by the courts to ascertain legislative intent.

The provisions of 19 U.S.C. 1309 had its genesis in the Act of June 24, 1884, 23 Stat. 57. Section 16 of that Act allowed articles of foreign production withdrawn from bonded warehouses for vessel supplies to be withdrawn free of duty. See also R.S. 2982 (1874). Under the Act of July

20, 1868, an excise tax was imposed on the manufacture of various articles. That Act provided for drawback if the articles were exported. See also R.S. 3330 and 3385. Under T.D. 13250 (1892), the Secretary of the Treasury ruled that R.S. 2982 applied only to duty on imported goods and that the provisions of R.S. 3330 and 3385 did not apply to vessel supplies since there was no exportation.

By section 14 of the Tariff Act of 1897, Act of July 24, 1897, Section 16 of the Act of June 24, 1884 was amended to allow the withdrawal of foreign and domestic goods free of duty or internal revenue tax, as the case may be, for vessel supplies. The stated purpose of the Act of July 24, 1897 was to provide revenue for the Government and to encourage the industries of the United States. It seems clear that the words "internal revenue tax" refers to tax collected for revenue purposes or for the protection of American industries from foreign competition. The HMF, on the other hand, was expressly stated to not be collected for revenue purposes but to repay the costs expended on harbor maintenance. Further, having expressly provided for certain exemptions in 26 U.S.C. 4462, it would be anomolous to find that Congress intended a law enacted a century earlier would provide an additional exemption.

HOLDING:

The Harbor Maintenance Fee is not an internal revenue tax within the meaning of 19 U.S.C. 1309. Rather, it is an excise tax collected to repay the costs expended on harbor maintenance. Therefore, you should deny this protest in full.

Appendix H

A copy of this decision should be attached to the CF 19, Notice of Action, and sent to protestant to satisfy the notice requirement of Section 174.30(a), Customs Regulations.

Sincerely,

John A. Durant, Director
Commercial Rulings Division

FILED
NOV 7 2001

No. 01-238

In the Supreme Court of the United States

BMW MANUFACTURING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Harbor Maintenance Tax, 26 U.S.C. 4461, applies to merchandise that is unloaded at a port and then later admitted to a Foreign Trade Zone.

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In the Supreme Court of the United States

No. 01-238

BMW MANUFACTURING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 241 F.3d 1357. The opinion of the Court of International Trade (Pet. App. 14a-27a) is reported at 69 F. Supp. 2d 1355.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. The petition for rehearing and suggestion for rehearing en banc was denied on May 9, 2001 (Pet. App. 30a). The petition for a writ of certiorari was filed on August 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, Congress enacted the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461, to help fund various harbor improvement programs. That statute imposes a tax on port use by importers, exporters,[1] domestic shippers and passenger liners. The tax is imposed at the rate of "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). For "cargo entering the United States," the tax is imposed on the importer "at the time of unloading." 26 U.S.C. 4461(c)(1)(A), (2)(B).

2. The present case involves foreign merchandise that was unloaded at a port of the United States and then transported by petitioner to a foreign trade zone facility (FTZ) located in Spartanburg, South Carolina. After paying the HMT due on the shipment, petitioner filed a complaint in the United States Court of International Trade to contest whether that tax properly applies to merchandise that is unloaded at a port and thereafter transferred within the United States to an FTZ facility.

3. The Court of International Trade held that the HMT applies in this situation because the statute "does not include specific exemption for cargo that is admitted into a foreign trade zone after unloading at a covered port." Pet. App. 19a. The court rejected petitioner's argument that merchandise admitted into a FTZ should be treated as exempt from the HMT under 19 U.S.C. 81c(a), which exempts merchandise entered at a foreign trade zone from customs duties until the merchandise is thereafter formally entered into the

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[1] Customs suspended the provisions for export vessel movements following the decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998).

United States. The court concluded that the HMT "is a generalized Federal charge for the use of certain harbors" and "is not by its nature a customs duty" within the meaning of the exemption statute. Pet. App. 19a (quoting *Texport Oil Co.* v. *United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999)).

The court next rejected petitioner's argument that the language of the HMT statute that specifies that "administrative and enforcement provisions of customs laws and regulations shall apply" to the HMT "as if such tax were a customs duty" (26 U.S.C. 4462(f)(1)) requires that the tax be treated as a customs duty for purposes of the FTZ exemption. Pet. App. 19a. The court held that the fact that the tax is treated as a customs duty for purposes of administration does not convert the tax into a customs duty for the purposes of the exemption contained in 19 U.S.C. 81c(a). Pet. App. 20a ("[t]o treat something for administration and enforcement, as something else, does not make it that other thing for all purposes."). The court noted that the HMT constitutes a tax, rather than a customs duty, because it is a generalized charge for port use that "applies whether the goods are exported, imported or shipped between domestic ports." *Id.* at 21a. The court emphasized (*id.* at 22a) that the HMT is further unlike a customs duty because liability for the tax attaches to goods simply "at the time of unloading." 26 U.S.C. 4461(c)(2)(B)). Petitioner's contention that HMT liability should not attach until sometime *after* the goods have been unloaded, transferred to a FTZ and then "*perhaps* enter the United States customs territory conflicts with" the plain text of the statute. Pet. App. 22a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court noted that Congress "has provided express

exemptions from the HMT for certain port uses"—such as shipments involving Alaska, Hawaii and United States possessions and for "bonded commercial cargo" that enters the United States for transportation to a foreign country. Pet. App. 6a (citing 26 U.S.C. 4462(b) and (d)(1)). Because Congress "expressly provided for the exemption of certain merchandise from the HMT" and did *not* expressly provide an exemption for merchandise delivered to a FTZ, the court held that "it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius.*" Pet. App. 6a-7a.

The court of appeals also agreed with the Court of International Trade that "just because the 'administrative and enforcement provisions' of the customs laws apply to the HMT does not mean that all provisions of the customs law apply." Pet. App. 8a. The court explained that, if Congress had intended to apply substantive provisions of the customs law "such as the customs duty exemption in § 81c(a)" to the HMT, "it would not have limited" the reference to customs provisions "to those that implicate only the 'administrati[on] and enforcement' of the HMT." Pet. App. 8a.[2]

The court noted that the plain language of the HMT statute makes "clear that the tax is due immediately upon cargo unloading, without regard to the destination of the merchandise." Pet. App. 9a. The court concluded that Congress "could not have intended that there be an HMT exemption for goods admitted into an FTZ without explicitly providing for one, as it did in the case of 'bonded commercial cargo,' I.R.C. § 4462(d)(1),

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[2] The court rejected petitioner's reliance on *IBM* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001), for that case merely held that judicial enforcement is "enforcement" within the language of the HMT statute. Pet. App. 8a.

because it is a general tax on port use that is not conditioned on formal entry into the customs territory of the United States." Pet. App. 9a. The court explained that the HMT is assessed on cargo "without regard to whether that cargo formally enters the customs territory of the United States" while the exemptions for FTZ merchandise contained in 19 U.S.C. 81c(a) are "targeted at duties and taxes that attach upon formal entry into the United States customs territory." Pet. App. 11a (citing S. Rep. No. 1107, 81st Cong., 1st Sess. 3-4 (1949)).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Congress imposed the HMT upon "any port use" in "an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(a) and (b). Except for goods being exported, liability for the HMT attaches "at the time of [cargo] unloading." 26 U.S.C. 4461(c)(2)(B). Congress directed the Treasury to prescribe regulations "to carry out the purposes" of the HMT and to "provid[e] for the manner and method of payment and collection of th[is] tax" (26 U.S.C. 4462(i)). Pursuant to that direction, the agency has specified that (19 C.F.R. 24.24(e)(2)(i) (emphasis added)):

> when *imported cargo* is unloaded from a commercial vessel at a port within the definition of this section,

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[3] The court of appeals also upheld the determination of the CIT that petitioner, as the applicant for admission of the merchandise into the FTZ, was the party liable for payment of the HMT under 26 U.S.C. 4461(c)(1). Pet. App. 12-13a.

> and *destined for* either consumption, warehousing, or *foreign trade zone admission*, the importer of that cargo, or in the case of foreign trade zones, the person or corporation responsible for bringing merchandise into the zone, *is liable for the payment of the port use fee at the time of unloading.*

Petitioner incorrectly asserts (Pet. 22 n.12) that the agency's regulation alters the liability provision of the HMT statute. The regulation, like the statute, clearly specifies that the HMT liability for imported goods attaches "at the time of unloading." 26 U.S.C. 4461(c)(2)(B); 19 C.F.R. 24.24(e)(2)(i). Because the agency's regulation reasonably implements the requirements of the statute, it should be upheld by the courts.

2. The Foreign Trade Zone Act, 19 U.S.C. 81c (1994 & Supp. V 1999), exempts merchandise admitted into a foreign trade zone from customs duties until the merchandise is thereafter formally entered into the United States.[4] The court of appeals correctly concluded that this statute does not preclude application of the HMT to

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[4] A foreign trade zone is an area inside United States territory which, for customs purposes, is considered outside of United States Customs territory. See *Hawaiian Independent Refinery* v. *United States*, 460 F. Supp. 1249 (Cust. Ct. 1978). Foreign trade zones "are accorded special treatment under the customs laws." *Citgo Petroleum Corp.* v. *The United States Foreign Trade Zones Board*, 83 F.3d 397, 399 (Fed. Cir. 1996). In particular, under 19 U.S.C. 81c(a), foreign merchandise is generally not subject to the payment of duties unless or until it is subsequently imported into the U.S. Customs territory. See Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Overview and Compilation of United States Trade Statutes* 49 (Comm. Print 1949). If merchandise admitted to an FTZ is consumed within that zone, however, customs duties may properly be imposed at that time notwithstanding the exemption in Section 81c(a). *Nissan Motor Mfg. Corp.* v. *United States*, 884 F.2d 1375, 1378 (Fed. Cir. 1989).

merchandise that is unloaded at a United States port before being admitted to a foreign trade zone. Pet. App. 6a-9a.

a. The statute and the regulation both specify that the HMT applies to cargo at the time it is unloaded at a port. 26 U.S.C. 4462(c)(2)(B); 19 C.F.R. 24.24(e)(2)(i). As the court of appeals emphasized (Pet. App. 6a), Congress provided an exemption from the HMT for shipments involving "Alaska, Hawaii, and possessions" (26 U.S.C. 4462(b)) and for "bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. 4462(d)(1).[5] The fact that Congress elected to exempt these specific, narrow categories of shipments from the HMT, but did not elect to exempt shipments to an FTZ from the tax, reflects that Congress intended the plain text of the statute to govern. As the court of appeals emphasized, Congress obviously knows how to provide an exemption from the tax and did not elect to do so for FTZ shipments: "Where it did not so provide, it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius.*" Pet. App. 6a.[6]

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[5] This exemption parallels 19 U.S.C. 1553, which provides an exemption from customs duties and taxes for merchandise "entered for transportation in bond through the United States by a bonded carrier * * * and exported under such regulations as the Secretary of the Treasury shall prescribe * * * ." 19 U.S.C. 1553(a). Petitioner's assertion that foreign trade zones should be accorded even more freedom from taxation than bonded warehouses (Pet. 9-10 n.5) is simply at odds with the clear text of the statute, which expressly exempts merchandise sent in bond for exportation to another country while it does not expressly exempt merchandise unloaded in a port before it is shipped to a foreign trade zone.

[6] Petitioner errs in seeking to rely (Pet. 25) on agency rulings issued under a different statute that provides an exemption from

b. The court of appeals also correctly rejected petitioner's contention that the HMT should be treated as if it were a "customs duty" or an "excise tax" that would be within the exemption afforded for free trade zone merchandise by the FTZ Act. The fact that Congress directed the "administrative and enforcement provisions of customs laws" to apply under the HMT "as if such tax were a customs duty" (26 U.S.C. 4462(f)(1)) obviously does not *make* "such tax * * * a customs duty." To the contrary, that formulation necessarily recognizes that the tax is *not* a customs duty.

As the court of appeals concluded, neither in substance nor in form does the HMT come within the ordinary understanding of a "customs duty." Pet. App. 8a. The HMT applies to any "port use" involving "commercial cargo"—a term that Congress defined to include purely domestic shipments of cargo and passenger cruise ships (26 U.S.C. 4462(a)(1) and (3)). The HMT thus applies by its terms to categories of port use that have no liability for customs duties. Moreover, as the court of appeals emphasized, Congress did not make the exemptions applicable for customs duties generally available to persons to whom the HMT applies. Instead, Congress directed only that the "administrative and enforcement provisions of customs laws" apply to the

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any "duty *and internal-revenue tax*" for supplies provided to aircraft engaged in foreign trade. 19 U.S.C. 1309(a) (emphasis added). In *Citgo Petroleum Corp.* v. *United States*, 104 F. Supp. 2d 106, 108-109 (Ct. Int'l Trade 2000), the Court of International Trade concluded that the exemption created by 19 U.S.C. 1309 is broad enough to apply to the HMT. The FTZ Act involved in the present case, however, provides an exemption only for duties or excise taxes imposed on entry into the customs territory of the United States and does not apply to all "internal-revenue tax[es]." See 19 U.S.C. 1309(a).

HMT. 26 U.S.C. 4462(f)(1).[7] As both of the courts below concluded, if Congress had intended to apply substantive provisions of customs law "such as the customs duty exemption in [the FTZ Act]" to the HMT, "it would not have limited" the reference to customs provisions "to those that implicate only the 'administrati[on] and enforcement' of the HMT." Pet. App. 8a.[8]

The passage quoted by petitioner (Pet. 19-20) from *Faber, Coe & Gregg* v. *United States*, 19 C.C.P.A. 8 (1931), demonstrates petitioner's error. It states that "[r]egardless of how taxes may be designated by the Congress, if they are imposed on imports while in customs custody, they are essentially customs duties and are determinable and collectible as prescribed by law." 19 C.C.P.A. at 12 (citations omitted). The HMT is *not* imposed on imports while in Customs's custody. Instead, it is imposed on merchandise *at the time of port use*, regardless of the destination of the goods or whether Customs takes custody of the merchandise. 26 U.S.C. 4461(c)(2)(B).[9] The exemption available under

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[7] The Customs Court (now the Court of International Trade) has long distinguished statutes that establish collection procedures from "preference[s] or exemption[s] under customs laws." See *Chicago Heights Distributing Co.* v. *United States*, 55 Cust. Ct. 254, 259 (1965).

[8] Petitioner's reliance (Pet. 20 n.10) on *Beercut-Vandervoot & Co.* v. *United States*, 44 C.C.P.A. 28 (1956), is misplaced. The court expressly noted that the internal revenue tax at issue in that case "attache[d] to imported distilled spirits at the time of importation" and not at the time of unloading. 44 C.C.P.A. at 32.

[9] Petitioner errs in relying (Pet. 15-16) on *United States Shoe, supra*, for the proposition that the HMT is a customs duty for purposes of the FTZ exemption provision. In that case, this Court held that the tax imposed by the HMT was not a permissible "user fee" and was therefore invalid as applied to exports under the Export Clause. 523 U.S. at 363. The Court held that the provi-

the FTZ Act, by contrast, applies only to the category of assessments that are made "*when the merchandise [is] sent into customs territory.*" Pet. App. 11a (quoting S. Rep. No. 1107, 81st Cong., 2d Sess. 3-4 (1949)).

c. Under petitioner's interpretation, the HMT would apply only when merchandise is withdrawn from an FTZ (possibly many years after the port use) and entered for consumption. The plain language of the statute, however, expressly states that the HMT is imposed on "port use," 26 U.S.C. 4461(a), and that liability for the HMT attaches at the time of the "unloading" of the merchandise at the covered port, 26 U.S.C. 4461(c)(2)(B). Because the HMT is imposed for port use and is due immediately upon unloading, it is irrelevant whether the merchandise next travels to a free trade zone and is not immediately entered into the customs territory of the United States.[10] No court has ruled to the contrary.

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sions of the HMT that incorporate the provisions for "administration and enforcement" of the customs laws require that the HMT be "treated as a customs duty for purposes of jurisdiction." *Id.* at 366. The Court did not hold that the HMT was to be treated as a customs duty in applying substantive exemption provisions such as the FTZ Act.

[10] Petitioner errs in relying (Pet. 23-24 & n.13) on the Merchandise Processing Fee (MPF). That fee is dependent on importation while the HMT is not. *Texport Oil Co.* v. *United States*, 185 F.3d at 1296-1297. The MPF is imposed on the importer "[f]or the processing of merchandise that is formally entered or released [from customs custody] during any fiscal year." 19 U.S.C. 58c(a)(9)(A). See also 19 U.S.C. 58c(b)(8)(E)(ii). The MPF is expressly designed to recoup "processing" costs incurred by the government on the entry of merchandise into the United States customs territory. By contrast, the HMT is imposed "on any port use," 26 U.S.C. 4461(a), and recoups the costs associated with the use of the port itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.

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No. 01-238

In the Supreme Court of the United States

BMW MANUFACTURING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Harbor Maintenance Tax, 26 U.S.C. 4461, applies to merchandise that is unloaded at a port and then later admitted to a Foreign Trade Zone.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 241 F.3d 1357. The opinion of the Court of International Trade (Pet. App. 14a-27a) is reported at 69 F. Supp. 2d 1355.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. The petition for rehearing and suggestion for rehearing en banc was denied on May 9, 2001 (Pet. App. 30a). The petition for a writ of certiorari was filed on August 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, Congress enacted the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461, to help fund various harbor improvement programs. That statute imposes a tax on port use by importers, exporters,[1] domestic shippers and passenger liners. The tax is imposed at the rate of "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). For "cargo entering the United States," the tax is imposed on the importer "at the time of unloading." 26 U.S.C. 4461(c)(1)(A), (2)(B).

2. The present case involves foreign merchandise that was unloaded at a port of the United States and then transported by petitioner to a foreign trade zone facility (FTZ) located in Spartanburg, South Carolina. After paying the HMT due on the shipment, petitioner filed a complaint in the United States Court of International Trade to contest whether that tax properly applies to merchandise that is unloaded at a port and thereafter transferred within the United States to an FTZ facility.

3. The Court of International Trade held that the HMT applies in this situation because the statute "does not include specific exemption for cargo that is admitted into a foreign trade zone after unloading at a covered port." Pet. App. 19a. The court rejected petitioner's argument that merchandise admitted into a FTZ should be treated as exempt from the HMT under 19 U.S.C. 81c(a), which exempts merchandise entered at a foreign trade zone from customs duties until the merchandise is thereafter formally entered into the

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[1] Customs suspended the provisions for export vessel movements following the decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998).

United States. The court concluded that the HMT "is a generalized Federal charge for the use of certain harbors" and "is not by its nature a customs duty" within the meaning of the exemption statute. Pet. App. 19a (quoting *Texport Oil Co.* v. *United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999)).

The court next rejected petitioner's argument that the language of the HMT statute that specifies that "administrative and enforcement provisions of customs laws and regulations shall apply" to the HMT "as if such tax were a customs duty" (26 U.S.C. 4462(f)(1)) requires that the tax be treated as a customs duty for purposes of the FTZ exemption. Pet. App. 19a. The court held that the fact that the tax is treated as a customs duty for purposes of administration does not convert the tax into a customs duty for the purposes of the exemption contained in 19 U.S.C. 81c(a). Pet. App. 20a ("[t]o treat something for administration and enforcement, as something else, does not make it that other thing for all purposes."). The court noted that the HMT constitutes a tax, rather than a customs duty, because it is a generalized charge for port use that "applies whether the goods are exported, imported or shipped between domestic ports." *Id.* at 21a. The court emphasized (*id.* at 22a) that the HMT is further unlike a customs duty because liability for the tax attaches to goods simply "at the time of unloading." 26 U.S.C. 4461(c)(2)(B)). Petitioner's contention that HMT liability should not attach until sometime *after* the goods have been unloaded, transferred to a FTZ and then "*perhaps* enter the United States customs territory conflicts with" the plain text of the statute. Pet. App. 22a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court noted that Congress "has provided express

exemptions from the HMT for certain port uses"—such as shipments involving Alaska, Hawaii and United States possessions and for "bonded commercial cargo" that enters the United States for transportation to a foreign country. Pet. App. 6a (citing 26 U.S.C. 4462(b) and (d)(1)). Because Congress "expressly provided for the exemption of certain merchandise from the HMT" and did *not* expressly provide an exemption for merchandise delivered to a FTZ, the court held that "it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius.*" Pet. App. 6a-7a.

The court of appeals also agreed with the Court of International Trade that "just because the 'administrative and enforcement provisions' of the customs laws apply to the HMT does not mean that all provisions of the customs law apply." Pet. App. 8a. The court explained that, if Congress had intended to apply substantive provisions of the customs law "such as the customs duty exemption in § 81c(a)" to the HMT, "it would not have limited" the reference to customs provisions "to those that implicate only the 'administrati[on] and enforcement' of the HMT." Pet. App. 8a.[2]

The court noted that the plain language of the HMT statute makes "clear that the tax is due immediately upon cargo unloading, without regard to the destination of the merchandise." Pet. App. 9a. The court concluded that Congress "could not have intended that there be an HMT exemption for goods admitted into an FTZ without explicitly providing for one, as it did in the case of 'bonded commercial cargo,' I.R.C. § 4462(d)(1),

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[2] The court rejected petitioner's reliance on *IBM* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001), for that case merely held that judicial enforcement is "enforcement" within the language of the HMT statute. Pet. App. 8a.

because it is a general tax on port use that is not conditioned on formal entry into the customs territory of the United States." Pet. App. 9a. The court explained that the HMT is assessed on cargo "without regard to whether that cargo formally enters the customs territory of the United States" while the exemptions for FTZ merchandise contained in 19 U.S.C. 81c(a) are "targeted at duties and taxes that attach upon formal entry into the United States customs territory." Pet. App. 11a (citing S. Rep. No. 1107, 81st Cong., 1st Sess. 3-4 (1949)).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Congress imposed the HMT upon "any port use" in "an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(a) and (b). Except for goods being exported, liability for the HMT attaches "at the time of [cargo] unloading." 26 U.S.C. 4461(c)(2)(B). Congress directed the Treasury to prescribe regulations "to carry out the purposes" of the HMT and to "provid[e] for the manner and method of payment and collection of th[is] tax" (26 U.S.C. 4462(i)). Pursuant to that direction, the agency has specified that (19 C.F.R. 24.24(e)(2)(i) (emphasis added)):

> when *imported cargo* is unloaded from a commercial vessel at a port within the definition of this section,

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[3] The court of appeals also upheld the determination of the CIT that petitioner, as the applicant for admission of the merchandise into the FTZ, was the party liable for payment of the HMT under 26 U.S.C. 4461(c)(1). Pet. App. 12-13a.

> and *destined for* either consumption, warehousing, or *foreign trade zone admission*, the importer of that cargo, or in the case of foreign trade zones, the person or corporation responsible for bringing merchandise into the zone, *is liable for the payment of the port use fee at the time of unloading.*

Petitioner incorrectly asserts (Pet. 22 n.12) that the agency's regulation alters the liability provision of the HMT statute. The regulation, like the statute, clearly specifies that the HMT liability for imported goods attaches "at the time of unloading." 26 U.S.C. 4461(c)(2)(B); 19 C.F.R. 24.24(e)(2)(i). Because the agency's regulation reasonably implements the requirements of the statute, it should be upheld by the courts.

2. The Foreign Trade Zone Act, 19 U.S.C. 81c (1994 & Supp. V 1999), exempts merchandise admitted into a foreign trade zone from customs duties until the merchandise is thereafter formally entered into the United States.[4] The court of appeals correctly concluded that this statute does not preclude application of the HMT to

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[4] A foreign trade zone is an area inside United States territory which, for customs purposes, is considered outside of United States Customs territory. See *Hawaiian Independent Refinery* v. *United States*, 460 F. Supp. 1249 (Cust. Ct. 1978). Foreign trade zones "are accorded special treatment under the customs laws." *Citgo Petroleum Corp.* v. *The United States Foreign Trade Zones Board*, 83 F.3d 397, 399 (Fed. Cir. 1996). In particular, under 19 U.S.C. 81c(a), foreign merchandise is generally not subject to the payment of duties unless or until it is subsequently imported into the U.S. Customs territory. See Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Overview and Compilation of United States Trade Statutes* 49 (Comm. Print 1949). If merchandise admitted to an FTZ is consumed within that zone, however, customs duties may properly be imposed at that time notwithstanding the exemption in Section 81c(a). *Nissan Motor Mfg. Corp.* v. *United States*, 884 F.2d 1375, 1378 (Fed. Cir. 1989).

merchandise that is unloaded at a United States port before being admitted to a foreign trade zone. Pet. App. 6a-9a.

a. The statute and the regulation both specify that the HMT applies to cargo at the time it is unloaded at a port. 26 U.S.C. 4462(c)(2)(B); 19 C.F.R. 24.24(e)(2)(i). As the court of appeals emphasized (Pet. App. 6a), Congress provided an exemption from the HMT for shipments involving "Alaska, Hawaii, and possessions" (26 U.S.C. 4462(b)) and for "bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. 4462(d)(1).[5] The fact that Congress elected to exempt these specific, narrow categories of shipments from the HMT, but did not elect to exempt shipments to an FTZ from the tax, reflects that Congress intended the plain text of the statute to govern. As the court of appeals emphasized, Congress obviously knows how to provide an exemption from the tax and did not elect to do so for FTZ shipments: "Where it did not so provide, it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius*." Pet. App. 6a.[6]

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[5] This exemption parallels 19 U.S.C. 1553, which provides an exemption from customs duties and taxes for merchandise "entered for transportation in bond through the United States by a bonded carrier * * * and exported under such regulations as the Secretary of the Treasury shall prescribe * * * ." 19 U.S.C. 1553(a). Petitioner's assertion that foreign trade zones should be accorded even more freedom from taxation than bonded warehouses (Pet. 9-10 n.5) is simply at odds with the clear text of the statute, which expressly exempts merchandise sent in bond for exportation to another country while it does not expressly exempt merchandise unloaded in a port before it is shipped to a foreign trade zone.

[6] Petitioner errs in seeking to rely (Pet. 25) on agency rulings issued under a different statute that provides an exemption from

b. The court of appeals also correctly rejected petitioner's contention that the HMT should be treated as if it were a "customs duty" or an "excise tax" that would be within the exemption afforded for free trade zone merchandise by the FTZ Act. The fact that Congress directed the "administrative and enforcement provisions of customs laws" to apply under the HMT "as if such tax were a customs duty" (26 U.S.C. 4462(f)(1)) obviously does not *make* "such tax * * * a customs duty." To the contrary, that formulation necessarily recognizes that the tax is *not* a customs duty.

As the court of appeals concluded, neither in substance nor in form does the HMT come within the ordinary understanding of a "customs duty." Pet. App. 8a. The HMT applies to any "port use" involving "commercial cargo"—a term that Congress defined to include purely domestic shipments of cargo and passenger cruise ships (26 U.S.C. 4462(a)(1) and (3)). The HMT thus applies by its terms to categories of port use that have no liability for customs duties. Moreover, as the court of appeals emphasized, Congress did not make the exemptions applicable for customs duties generally available to persons to whom the HMT applies. Instead, Congress directed only that the "administrative and enforcement provisions of customs laws" apply to the

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any "duty *and internal-revenue tax*" for supplies provided to aircraft engaged in foreign trade. 19 U.S.C. 1309(a) (emphasis added). In *Citgo Petroleum Corp.* v. *United States*, 104 F. Supp. 2d 106, 108-109 (Ct. Int'l Trade 2000), the Court of International Trade concluded that the exemption created by 19 U.S.C. 1309 is broad enough to apply to the HMT. The FTZ Act involved in the present case, however, provides an exemption only for duties or excise taxes imposed on entry into the customs territory of the United States and does not apply to all "internal-revenue tax[es]." See 19 U.S.C. 1309(a).

HMT. 26 U.S.C. 4462(f)(1).[7] As both of the courts below concluded, if Congress had intended to apply substantive provisions of customs law "such as the customs duty exemption in [the FTZ Act]" to the HMT, "it would not have limited" the reference to customs provisions "to those that implicate only the 'administrati[on] and enforcement' of the HMT." Pet. App. 8a.[8]

The passage quoted by petitioner (Pet. 19-20) from *Faber, Coe & Gregg* v. *United States*, 19 C.C.P.A. 8 (1931), demonstrates petitioner's error. It states that "[r]egardless of how taxes may be designated by the Congress, if they are imposed on imports while in customs custody, they are essentially customs duties and are determinable and collectible as prescribed by law." 19 C.C.P.A. at 12 (citations omitted). The HMT is *not* imposed on imports while in Customs's custody. Instead, it is imposed on merchandise *at the time of port use*, regardless of the destination of the goods or whether Customs takes custody of the merchandise. 26 U.S.C. 4461(c)(2)(B).[9] The exemption available under

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[7] The Customs Court (now the Court of International Trade) has long distinguished statutes that establish collection procedures from "preference[s] or exemption[s] under customs laws." See *Chicago Heights Distributing Co.* v. *United States*, 55 Cust. Ct. 254, 259 (1965).

[8] Petitioner's reliance (Pet. 20 n.10) on *Beercut-Vandervoot & Co.* v. *United States*, 44 C.C.P.A. 28 (1956), is misplaced. The court expressly noted that the internal revenue tax at issue in that case "attache[d] to imported distilled spirits at the time of importation" and not at the time of unloading. 44 C.C.P.A. at 32.

[9] Petitioner errs in relying (Pet. 15-16) on *United States Shoe*, *supra*, for the proposition that the HMT is a customs duty for purposes of the FTZ exemption provision. In that case, this Court held that the tax imposed by the HMT was not a permissible "user fee" and was therefore invalid as applied to exports under the Export Clause. 523 U.S. at 363. The Court held that the provi-

the FTZ Act, by contrast, applies only to the category of assessments that are made "*when the merchandise [is] sent into customs territory.*" Pet. App. 11a (quoting S. Rep. No. 1107, 81st Cong., 2d Sess. 3-4 (1949)).

c. Under petitioner's interpretation, the HMT would apply only when merchandise is withdrawn from an FTZ (possibly many years after the port use) and entered for consumption. The plain language of the statute, however, expressly states that the HMT is imposed on "port use," 26 U.S.C. 4461(a), and that liability for the HMT attaches at the time of the "unloading" of the merchandise at the covered port, 26 U.S.C. 4461(c)(2)(B). Because the HMT is imposed for port use and is due immediately upon unloading, it is irrelevant whether the merchandise next travels to a free trade zone and is not immediately entered into the customs territory of the United States.[10] No court has ruled to the contrary.

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sions of the HMT that incorporate the provisions for "administration and enforcement" of the customs laws require that the HMT be "treated as a customs duty for purposes of jurisdiction." *Id.* at 366. The Court did not hold that the HMT was to be treated as a customs duty in applying substantive exemption provisions such as the FTZ Act.

[10] Petitioner errs in relying (Pet. 23-24 & n.13) on the Merchandise Processing Fee (MPF). That fee is dependent on importation while the HMT is not. *Texport Oil Co.* v. *United States*, 185 F.3d at 1296-1297. The MPF is imposed on the importer "[f]or the processing of merchandise that is formally entered or released [from customs custody] during any fiscal year." 19 U.S.C. 58c(a)(9)(A). See also 19 U.S.C. 58c(b)(8)(E)(ii). The MPF is expressly designed to recoup "processing" costs incurred by the government on the entry of merchandise into the United States customs territory. By contrast, the HMT is imposed "on any port use," 26 U.S.C. 4461(a), and recoups the costs associated with the use of the port itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Three underlying and recurring themes are raised by respondent in its brief in opposition (Br. in Op.). Those contentions are addressed below.

1. Respondent defends its imposition of the Harbor Maintenance Tax (HMT) on foreign goods admitted to foreign trade zones and subzones (FTZ) by noting that the statute imposes a tax on port use by importers which must be paid "at the time of unloading." Br. in Op. 2 and 5. Respondent reasons that because petitioner unloaded foreign goods at a port prior to their admission to an FTZ, the goods are subject to HMT imposition.

Respondent correctly describes the applicability of the HMT to imported goods in its introductory paragraph of its Statement section.

> The tax [HMT] is imposed at the rate of "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). For "cargo entering the United States," the tax is imposed on the importer "at time of unloading." 26 U.S.C. 4461(c)(1)(A), (2)(B).

Br. in Op. 2. Petitioner does not contest that its goods were unloaded at a port; rather, petitioner's challenge is based upon the FTZ admission of foreign goods not satisfying the "cargo entering the United States" prerequisite.

In selecting the U.S. Customs Service to administer and enforce the HMT, Congress well appreciated that Customs' "substantial body of law relating to the importation of merchandise and the collection of customs duties" would "apply with regard to the port user fee charges imposed by the committee amendment as if such charges were customs duties." H. Rep. No. 99-228, 99th Cong. 2d Sess. 10 (1986), *reprinted in* U.S.C.C.A.N. 6705, 6714-15. All customs administrative and

enforcement provisions apply to the HMT as if it were a customs duty. 26 U.S.C. § 4462(f)(1). In accordance with customs administrative and enforcement provisions, "cargo entering the United States" refers to the clearance of goods into the customs territory of the United States following the filing, with Customs, of appropriate documentation by the importer of record. 19 U.S.C. § 1484. *See Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1118 (Fed. Cir. 1998).

Based upon carefully considered and well documented international trade policy considerations, and as embodied in 19 U.S.C. § 81c(a), the United States created a legal fiction wherein foreign goods physically located within its borders are, for customs administrative and enforcement purposes, considered to be outside the United States when admitted to a FTZ. "[T]hough located on United States soil — [a foreign-trade zone] receives treatment under the customs laws as a territory outside the United States." *Ford Motor Co. v. United States*, 157 F.3d 849, 852 (Fed. Cir. 1998). Because cargo that has not entered the United States is not subject to the HMT, FTZ admitted foreign goods are not subject to the HMT.

While fashioning the legislation that in 1986 became the HMT statute, Congress was fully cognizant that cargo entering the United States would not include FTZ admitted goods, unless expressly provided. In 1980 a tax on "petroleum products entered into the United States for consumption, use, or warehousing" was established by 26 U.S.C. § 4611(a)(2). To impose the tax on foreign-trade zone admissions, Congress explicitly defined "United States" to include foreign-trade zones for petroleum tax purposes. 26 U.S.C. § 4612(a)(4)(C).[1] Statutorily defining

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1. 26 U.S.C. § 4612(a)(4)(C) provides:

(a) Definitions — For purposes of this subchapter —

* * *

(Cont'd)

the "United States" to include FTZs was also incorporated in the chemical tax, 26 U.S.C. § 4662(a)(2), and the ozone depleting tax, 26 U.S.C. § 4682(e)(2). In contrast, Congress did not define the "United States" as including foreign-trade zones for HMT purposes.[2]

2. Relying upon the statutory construction principle of *expressio unuis est exclusio alterius*, respondent (as well as the court of appeals) reasons that Congress' failure to expressly include an FTZ exemption within the HMT statute is proof that none was intended. Br. in Op. 4 and 7.

First, if, as petitioner contends, FTZ admissions of foreign goods do not constitute "cargo entering the United States," there would be no need for a FTZ exemption because FTZ admissions would not be embraced by the HMT in the first instance. Second, despite its contention that all exemptions must be expressly set forth within the four corners of the HMT statute, respondent acknowledges that a customs statutory exemption not enumerated therein nevertheless applies to the HMT. Br. in Op. 7-8 n.6. In *Citgo Petroleum Corp. v. United States*, 104 F. Supp. 2d 106 (Ct. Int'l Trade 2000) (no appeal taken) the Court of International Trade ruled that the HMT could not be imposed

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(Cont'd)

> (c) United States includes foreign trade zones. — The term "United States" includes any foreign trade zone of the United States.

2. Enactment of the petroleum tax and chemical tax occurred in 1980, the ozone depleting tax in 1989. Congress plainly understood that even in instances where a tax was not explicitly directed to be treated like a customs duty, it would not embrace FTZ admitted goods, unless expressly included within the statute. Shielding FTZ admissions from HMT imposition is even more compelling by virtue of § 4462(f)(1)'s customs duty treatment directive.

on qualifying imports under 19 U.S.C. § 1309(a)[3]. The HMT statute contains no § 1309(a) exemption.

Moreover, not only is respondent's reliance upon the principle of *expressio unius est exclusio alterius* undermined by the *Citgo* decision, but that same principle in two different contexts affirmatively supports petitioner's contention that FTZ admissions are not embraced by the HMT. As previously explained, Congress' statutory construct of other federal exactions demonstrates that for FTZ admissions to be encompassed by the HMT the term "United States" must expressly be defined as including foreign-trade zones. "United States" was not so defined for HMT purposes. Additionally, had Congress wanted to limit the customs administrative and enforcement provisions which apply to an exaction being treated like a customs duty, Congress would have so stated. For example, in 19 U.S.C. § 58c(g)(2), in language virtually identical to 26 U.S.C. § 4462(f)(1),[4] Congress provided that all administrative and enforcement provisions of customs laws were to apply to the Merchandise Processing Fee (MPF) as if the fee were a customs duty, with one exception — the drawback provisions.[5] Congress' failure

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3. In pertinent part, § 1309(a) provides that imported goods destined for certain specified uses, e.g., supplies for aircraft actually engaged in foreign trade, can be removed from bonded warehouses and foreign-trade zones "free of duty and internal revenue taxes." *Citgo* held, and Customs now accepts, that § 1309(a) qualifying goods are exempt from the HMT. In view of Customs' recognition of a § 1309(a) exemption, it is particularly difficult to fathom respondent's continued assertion that only exemptions expressly set forth in the HMT statute can apply.

4. *See* Pet. 23-24 n.13 for a side-by-side comparison of the two provisions.

5. Where FTZ provisions prevent the imposition of duties and excise taxes on foreign goods admitted to a FTZ, the drawback (Cont'd)

to define "United States" as including FTZs, or to exclude the FTZ provisions from the body of customs laws which were to apply to the HMT, are powerful and persuasive indications that Congress intended FTZ provisions apply to the HMT.

3. The respondent contends that the formulation in § 4462(f)(1), whereby all administrative and enforcement provisions of the customs laws shall apply to the HMT "as if such tax were a customs duty," necessarily recognizes that the HMT is not a customs duty. Br. in Op. 8.

Succinctly stated, petitioner's contention has never been that the HMT is a customs duty, but rather that it is an excise tax which must be *treated as if it were a customs duty* for purposes of all customs administrative and enforcement provisions, including 19 U.S.C. § 81c(a). Designation of an exaction as a customs duty and treatment of an exaction as if it were a customs duty are identifiably different standards, which, in this instance, lead to the same result. For example, 19 U.S.C. § 1528 disjunctively provides that a tax or other charge shall be construed to be a customs duty if the tax or charge has either been designated a customs duty "*or* contains a provision to the effect that it shall be treated as a duty imposed under the customs laws." Distinct standards, same treatment.

While not disputing respondent's observation that Congress chose not to designate the HMT a customs duty,[6] it is equally

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provisions provide a means to receive duty refunds on imported goods subsequently exported from the United States. In Customs Headquarters Ruling 227638, Pet. App. 41a-57a, Customs ruled that the FTZ provisions applied to the MPF because, unlike the drawback provisions, the FTZ provisions were *not* excluded from MPF customs duty treatment.

6. Reasons why Congress chose not to designate the HMT a customs duty and instead opted for treatment as if it were a customs duty are suggested in the HMT's legislative history. *See* Pet. 10 n.6.

true that Congress directed that the HMT be treated like a customs duty for "all administrative and enforcement provisions of the customs laws." 26 U.S.C. § 4462(f)(1). That statutory formulation is sufficient to place a customs administrative and enforcement overlay on how the HMT statute is to be construed and interpreted. This reading of the HMT statute was the very basis upon which respondent recently informed this Court that "Congress elected to treat the Harbor Maintenance Tax as a customs duty, rather than as an internal revenue tax." Government's Opposition to the Petition for Writ of Certiorari in *IBM Corp. v. United States*, Docket No. 00-482, at 5.[7]

CONCLUSION

For the reasons set forth in both our petition and our reply briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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7. Emphasizing that the HMT must be treated as a customs duty, respondent successfully argued for the non-payment of interest on HMT payments unconstitutionally collected on exports. *IBM Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001).